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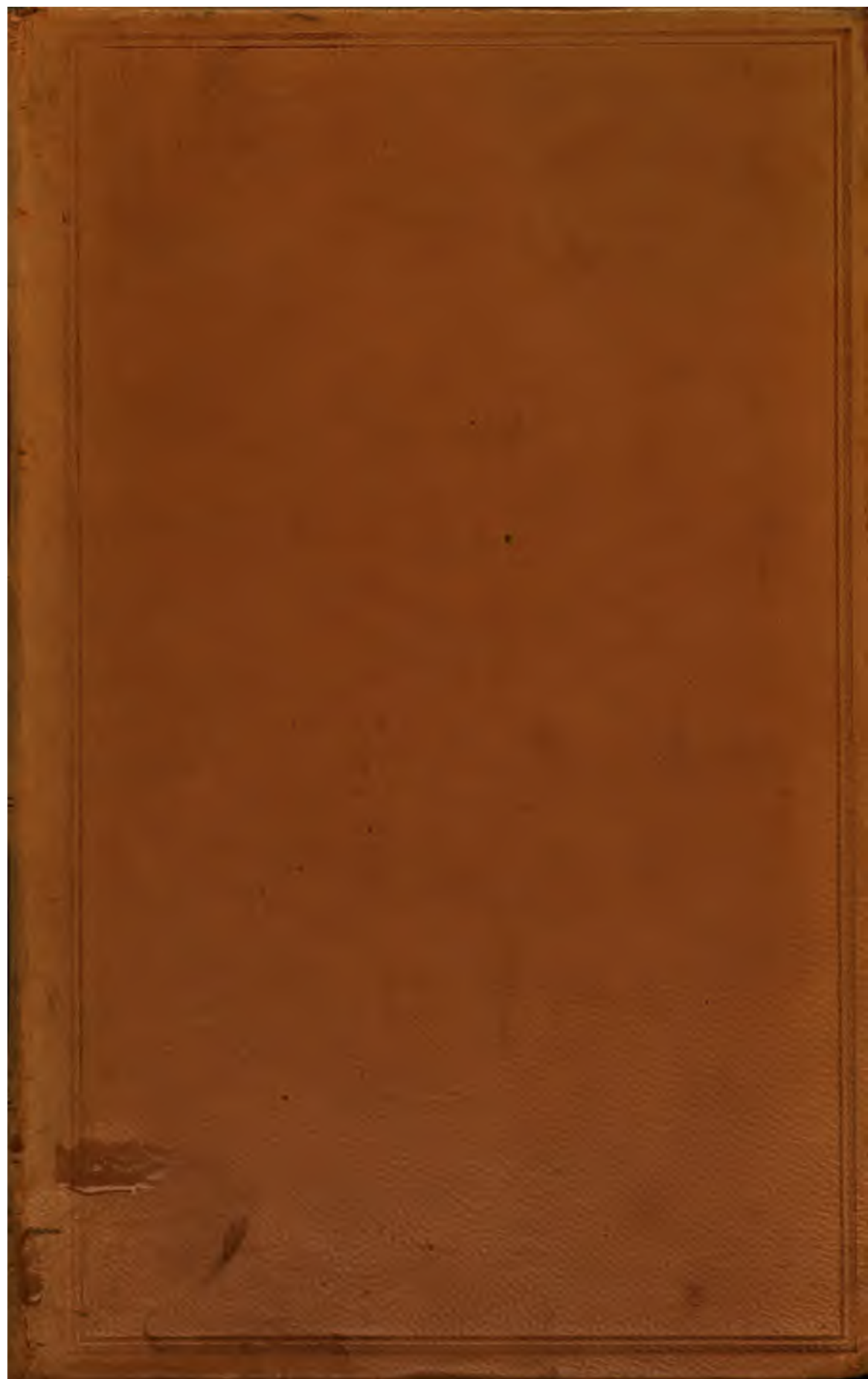
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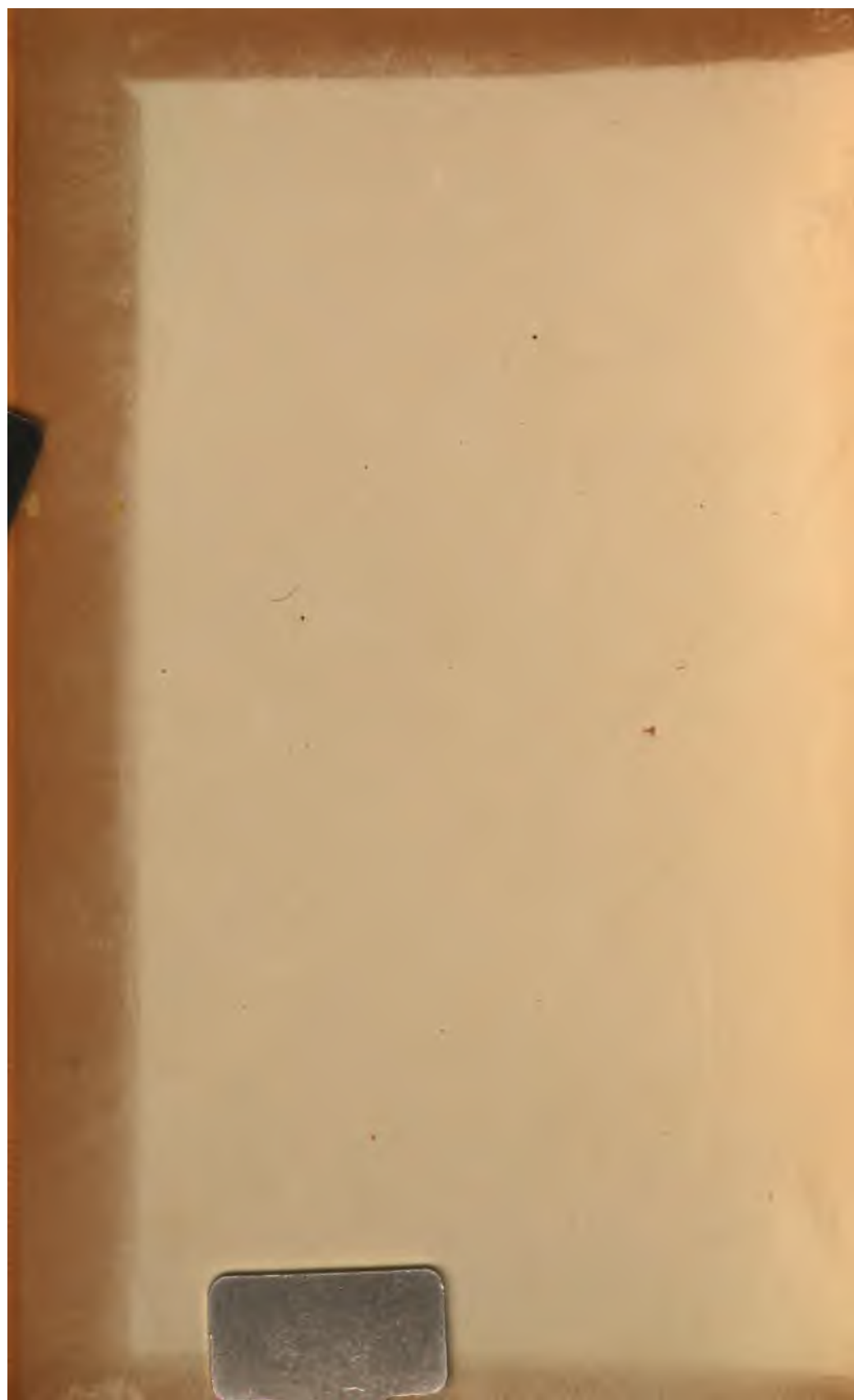
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(Vol. 47 American and English
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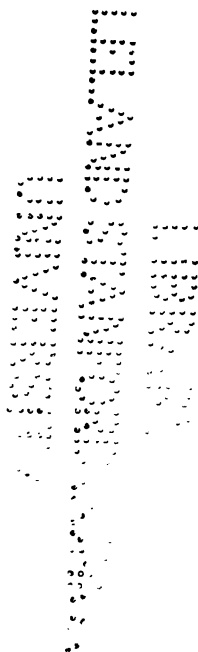
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RAILROAD REPORTS

PERRY F. POWERS, as Auditor General of the State of Michigan,
App't., v. DETROIT, GRAND HAVEN, & MILWAUKEE RAIL-
WAY COMPANY.

(Argued February 26, 1906. Decided April 16, 1906.)

[26 Sup. Ct. Rep. 556.]

Courts—Following Decisions of State Courts—Validity of State Legislation.—The decision of the highest state court that a state statute which is claimed to create a contract is valid will be followed by the Supreme Court of the United States in determining whether any contract obligations have been impaired by subsequent legislation.

Constitutional Law—Impairment of Contract Obligations—Exemptions from Taxation.—A contract between a state and a railway company, which prevented the subjection of the property of the company to any other than the tax prescribed in Mich. Laws, 1855, p. 305, § 9, was created by the provisions of that section that the company shall pay an annual tax of 1 per cent. on the capital stock of said company, paid in, which tax shall be in lieu of all other taxes except for penalties imposed on said company, and shall be estimated upon its last annual report, the statute being a special one, having reference only to the company in question, which formally accepted the taxation provision, and made large expenditures, and completed an unfinished railroad, to induce which was the motive for the enactment.

Appeal from the Circuit Court of the United States for the Western District of Michigan to review a decree enjoining the enforcement of a statute of that state taxing railroad property as against a railroad company asserting the existence of a contract exemption from such taxation. *Affirmed.*

See same case below, 138 Fed. 264.

Statement by MR. JUSTICE BREWER:

This case, which is a suit brought by the appellee in the circuit court of the United States for the western district of Michigan, while involving the validity of the railroad tax law of the state of Michigan (Acts 1901, chap. 173, p. 236), recently considered by this court (*ante*, page 459) involves the further question of the existence and scope of an alleged contract in respect to taxation. The Detroit & Pontiac Railroad Company was chartered by the legislature of the territory of Michigan, March 7, 1834, the Oakland & Ottawa Railroad Company by the legislature of the state of Michigan, April 3, 1848, (Laws 1848, p. 351.) By an act of February 13, 1855 (Laws of 1855, p. 305),

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the Detroit & Pontiac Railroad was authorized to change its name to the Detroit & Milwaukee Railway Company, to purchase all the rights, property, and franchises of the Oakland & Ottawa Railroad Company for the building and operating a continuous line of road from Detroit to Lake Michigan, and the purchase and sale thus provided for was duly effected. Section 9 of this act provided that—

“the said company shall, on or before the first day of July, pay the state treasurer an annual tax of 1 per cent. on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation, or any other law of this state. The said tax shall be estimated upon the last annual report of said corporation.”

Since 1850 the state Constitution has contained these provisions:

“Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed. But the legislature may, by a vote of two thirds of the members elected to each house, create a single bank with branches.” Art. 15, § 1.

“The legislature shall pass no law altering or amending any act of incorporation heretofore granted, without the assent of two thirds of the members elected to each house; nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations.” Art. 15, § 8.

In 1860 certain mortgages on the road were foreclosed and the company reorganized, and again in 1878 the road with its appurtenances and franchises was sold upon mortgage foreclosure and again reorganized as the Detroit, Grand Haven, & Milwaukee Railway Company. These foreclosures and reorganizations took place under the authority of act No. 96 (Laws of 1859, p. 52).

On the hearing in the circuit court it was held that § 9, above quoted, created a contract between the state and the company which prevented the enforcement against it of the railroad tax law, and a decree was entered accordingly (138 Fed. 264) from which decree the state auditor appealed directly to this court.

Messrs. Timothy E. Tarnsney, John E. Bird, Charles A. Blair, Loyal E. Knappen, and Roger Irving Wykes, for appellant.

Messrs. H. Geer and L. C. Stanley, for appellee.

MR. JUSTICE BREWER delivered the opinion of the court:

Many questions which might otherwise be perplexing are settled by the decision of the supreme court of Michigan in *Atty. Gen. v. Joy*, 55 Mich. 94, 20 N. W. 806. That was an information brought by the attorney general in the supreme court of the state, charging the defendants with claiming and usurping the corporate rights and franchises of the Detroit, Grand Haven, & Milwaukee Railway Company. The act of 1855 was sustained,

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notwithstanding some alleged defects in its passage, and it was decided that it did not create a new corporation, but simply authorized the old territorial corporation, the Detroit & Pontiac Railroad Company, to change its name and extend its line of road, and, further, that this act in no respect conflicted with §§ 1 and 8, article 15, of the state Constitution. The court also sustained the act of 1859, under which the foreclosures took place, and held that by them no new company was chartered, that there was simply a reorganization and continuance of the old company.

The latter act provides that upon certain conditions new stock shall be issued in lieu of the old stock, the old officers of the company superseded, "and the new stockholders and officers shall, in the law, be deemed and taken to be the stockholders and officers of said corporation, the charter and all laws appertaining thereto continuing to be the charter and laws regulating and governing said corporation, except that it may be known and called, and sue and be sued, and may contract and do all acts which in the law it could have done in its old name, in and by the name set forth in the declaration aforesaid." (P. 253.)

The testimony in this case shows compliance with these conditions. Compliance was also shown in *Cook v. Detroit, G. H. & M. R. Co.*, 43 Mich. 349, 5 N. W. 390, and in that case the validity of the new organization as a continuance of the old corporation was recognized.

We thus come to the question of the effect of § 9 of the act of 1855. It has been often decided by this court, so often that a citation of authorities is unnecessary, that the legislature of a state may, in the absence of special restrictions in its Constitution, make a valid contract with a corporation in respect to taxation, and that such contract can be enforced against the state at the instance of the corporation. It is said that we are not concluded by a decision of the supreme court of a state in reference to the matter of contract; that while the rule is to accept the construction placed by that court upon its statutes, an exception is made in case of contracts, and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation. *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199. It is in order to uphold the provision of the Federal Constitution that no state shall pass a law impairing the obligation of a contract that this duty of independent judgment is cast upon this court. But here the supreme court of the state has ruled in favor of the continued existence of a corporation and the applicability of certain statutes, and when, upon the face of such statutes, a valid contract appears, we accept the ruling that the statutes are valid and applicable enactments. In other words, the supreme court of the state having sustained the validity of a statute from which a contract is claimed, this court follows that decision, and starts with the question, What contract is shown by statute?

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The particular section which it is claimed creates the contract (§ 9 of the act of 1855) provides that the company shall pay an "annual tax of 1 per cent. on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation, or any other law of this state." It is contended in the first place that this is a mere gratuity, which can be withdrawn at any time,—a statute in respect to taxation subject to change like other revenue statutes; and *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107, is cited as authority. But the difference between that case and this is obvious. That arose on a general law in respect to taxation; this, on a provision in a special act having reference to a particular corporation,—an act which called for and received acceptance by the corporation. It was said in the opinion in that case (p. 385, L. ed. p. 230, Sup. Ct. Rep. p. 108):

"A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise is pointed out in *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 L. ed. 611, 19 Mich. 259, 2 Am. Rep. 82. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Tucker v. Ferguson*, 22 Wall. 527, 12 L. ed. 805; *Grand Lodge, F. & A. M. v. New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523. * * * The presence or absence of consideration is an aid to construction in doubtful cases,—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope, but not amounting to a covenant."

That there was ample consideration for a contract in this case, if consideration be necessary is shown by the opinion of the supreme court in *Atty. Gen. v. Joy*, supra, when it says (p. 101, N. W. p. 809):

"The act of 1855 was not promoted exclusively in the interest of the railroad companies named in it, but the state itself was largely concerned, and expected to accomplish important public purposes by means of it. Twenty years before that time the state had planned for the construction of several parallel lines of railroad across the state from east to west, one of which was to be north of the line of the Michigan Central Railroad, and was expected to be of very high value, not only to all that part of the state through which it would run, but to the whole state. Much disappointment had come from the road not being constructed; and when the Detroit & Pontiac Railroad Company, which already had near 30 miles of road in successful operation, and could command means for the construction of more, pro-

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posed, on certain terms which were expressed in the act of 1885, to purchase the rights and franchises of the Oakland & Ottawa Company, and to extend their own road to Lake Michigan, there is no reason for doubting that the people of the state at large looked upon this as a favorable opportunity for accomplishing a desire which twenty years before had found expression in the legislation of the state, and which ever since had been kept constantly in view."

* * * * *

"It has already been seen that the important public purpose which the state had in view in assenting to the act of 1855 has been accomplished; the railroad from Pontiac to Lake Michigan has been constructed and for many years operated, and the state has reaped the benefits. But in order to accomplish this public purpose it seems to have become necessary to put the bonds and shares of the Detroit & Milwaukee Railway Company upon the market as well in Europe as in this country; the state recognized the necessity, and by its legislation provided for facilitating sales. The bonds and shares were sold to the amount of very many millions; and every purchaser of one of them made the purchase in reliance upon legislation of this state which appeared to sanction if not to invite it." P. 104, N. W. p. 811.

See further, *Home of the Friendless v. Rouse*, 8 Wall. 430, 436, 19 L. ed. 495, 497, in which we said:

"It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

"There is no necessity of looking for the consideration for a legislative contract outside of the object for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it."

Surely no clearer case of contract can be presented than one in which a legislature passes an act in respect to a particular corporation making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation and the completion of an unfinished road whose completion is deemed of great public importance, and where the special provision is, as required, formally accepted, the expenditures made, and the road completed.

It is suggested that this provision is not in terms made perpetual. A sufficient answer to this is found in *Home of the Friendless v. Rouse*, 8 Wall. 437, 19 L. ed. 497:

"Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. 'All property of said corporation shall be exempt from taxation' are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the legislative inten-

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tion. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature, without taking direct action on the subject, could at its will resume the power of taxation."

It is further contended that the contract provided in § 9 is one relating to the property of the shareholders, and not to that of the corporation. The terms "shares," "stock," "capital," "capital stock," are of frequent and not uniform use, and we have often to turn to the context to see what is intended by their use in a particular case. That a distinction exists between that which is the property of the shareholder, and subject to taxation as other property belonging to them, and that which is the property of the collective incorporated person we call a corporation, and subject to taxation as such, has been repeatedly pointed out. See *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222; *Bank of Commerce v. Tennessee*, 104 U. S. 493, 26 L. ed. 810; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Shelby County v. Union & P. Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *Central R. & Bkg. Co. v. Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

In the first of these cases a bank's charter provided that the company "shall pay to the state an annual tax of $\frac{1}{2}$ of 1 per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes," and it was held that that was a contract in reference to the property of the shareholders, and prevented further taxation upon their separate property. In the opinion it was said (pp. 686, 687, L. ed. p. 560):

"The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. * * * The capital stock and the shares may both be taxed, and it is not double taxation."

In the second is this ruling (p. 707, L. ed. p. 1093):

"In general, an exemption of capital stock, without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which, in the legitimate operations of the corporation, comes to represent the capital."

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And in *Tennessee v. Whitworth*, 117 U. S. 136, 29 L. ed. 832, 6 Sup. Ct. Rep. 647, this description of separable elements of value was given:

"In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation."

In several of the cases attention is called to the qualifying words which show an intent on the part of the legislature of something other than that generally embraced within the term "capital stock." But it is unnecessary to review these cases in detail.

By § 9 the tax is "on the capital stock of said company paid in." Clearly that refers to the property which the corporation has received and presumably holds. It is not the individual property of the share-holders which is contemplated, but that which is in the treasury of the corporation, or included among its assets. This, as we have seen from the quotations, is the ordinary meaning of the term "capital stock." Further, we find that this tax is to be "in lieu of all other taxes, except for penalties imposed upon said company." In other words, the tax upon the company of 1 per cent. may be increased by any penalties imposed upon the company, and in no other way. Again, the tax is to "be estimated upon the last annual report of said corporation." While such report might be expected to include not merely the property belonging to the corporation but also the number and names of the stockholders and the number of shares held by each, and possibly also the amount paid in by each, yet the word "estimated" carries with it the idea of valuation rather than of mathematical apportionment. It apparently suggests that the property reported by the corporation is to be the basis upon which the assessors shall make their valuation, so that the tax is "estimated" upon that property rather than fixed by the mere process of multiplication or division. That the tax is to be paid by the company is of course not conclusive on the question, but it is in harmony with all the other provisions of the section. Still further, we have the practical construction placed by the authorities for a long series of years, continued up to the year 1898. Under those circumstances we are of opinion that the tax provided for by § 9 is a tax upon the property of the corporation, and not a tax upon the shares of stock held by the shareholders. There was, therefore, a contract between the state and the corporation which prevented the subjection of the property of the corporation to any other than the tax prescribed in the statute.

The decree of the Circuit Court is affirmed.

MR. JUSTICE WHITE dissented.

KANSAS CITY, S. & G. RY. CO. *v.* LOUISIANA W. R. CO.

(Supreme Court of Louisiana, Feb. 26, 1905.)

[40 So. Rep. 627.]

Railroads—Connections and Crossings—Spur Tracks.—The constitutional right of a railroad company to intersect, connect with, or cross any other railroad is not confined to main tracks, but extends to spur and other tracks forming a part of the same system.

Same—Public Highways.—All railroads are declared by the Constitution to be public highways and all railroad companies to be common carriers. This declaration applies, not only to main tracks, but also to all subsidiary tracks used for the purposes of railroad traffic.

Eminent Domain—Public Use—Crossing Other Roads.*—Where a proposed spur track is intended for the transfer of freight in car load lots to and from a number of industrial plants in a town or city, its use is open to the public, and the railroad company constructing such a track has the right to expropriate necessary crossings over the spur tracks of another railroad company. Act No. 74, p. 103, of 1902.

Same—Location—Number.—The location and number of such crossings and their necessity involve questions of fact properly submitted to the jury of freeholders.

Same—Compensation—Elements of Damage.—Where the plaintiff company takes nothing but the easement of crossing, the compensation should be based on the depreciation in value of the property resulting from the joint use of the tracks. The value of the portion actually used, and the consequent depreciation, if any, of the value of the remainder for railroad purpose, should be considered; but mere interruption or inconvenience in the transaction of business, increased liability to accidents, and the stopping or flagging of trains at crossings, if required by statute or ordinances, do not constitute elements of damage.

Same—Award—Appeal.—In case of railroad crossings, where nothing is actually taken but the joint use of small portions of spur tracks, and the injury to the remainder for railroad purposes is doubtful and uncertain, the award of a jury of freeholders of the vicinage, who have inspected the proposed crossings and who are familiar with all the surroundings, will not be disturbed as to amount.

Appeal—Amendment of Judgment.—Where it was stated to the jury by the officials of plaintiff company that it would be compelled to construct and maintain the crossings sued for at its own expense, and such

*For the authorities in this series on the question, what are public uses for which property may be condemned, see foot-note appended to *Collier v. Union Ry. Co.* (Tenn.), 17 R. R. R. 426, 40 Am. & Eng. R. Cas., N. S., 426; foot-note appended to *New Orleans Term. Co. v. Teller* (La.), 15 R. R. R. 64, 38 Am. & Eng. R. Cas., N. S., 64.

For the authorities in this series on the right of a company to condemn a right to cross the line of another railroad, see foot-note appended to *Atchison, etc., Ry. Co. v. Kansas City, etc., Ry. Co.* (Kan.), 3 R. R. R. 894, 31 Am. & Eng. R. Cas., N. S., 894.

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statement is reiterated by counsel in the Supreme Court, the verdict and judgment will be amended so as to enforce such understanding. (Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by the Kansas City, Shreveport & Gulf Railway against the Louisiana Western Railroad Company. Judgment for plaintiff, and defendant appeals. Amended and affirmed.

Williams & Williams, for appellant.

McCoy & Moss and *Alexander & Wilkinson*, for appellee.

LAND, J. Plaintiff company instituted this suit for the purpose of expropriating several crossings over the tracks of the defendant company as per map attached to the petition. The petition alleges that the crossings sued for are necessary to enable plaintiff company to properly conduct its business as a common carrier "and for the interest of the public and in order that it may reach various places of business" in the city of Lake Charles.

Defendant excepted that the petition sets forth no legal cause of action and no right of action against the defendant. This exception was overruled, and the defendant answered, first pleading the general issue, and then contesting the plaintiff's right to expropriate the said crossings, on the grounds that the purpose was to secure a right of way for the construction and operation of spur tracks to reach private industries; that by reason of the location and number of the crossings sought defendant would be deprived to a great extent of the beneficial use and enjoyment of their own spur tracks; and that plaintiff has no legal right to expropriate property devoted, as defendant avers its said tracks to be, to a public use for the purpose of a similar and no more important use.

In case of the overruling of the foregoing defenses, the answer further avers that the crossings sued for are unreasonable and unnecessary in number, thereby increasing the danger and expense of operating defendant's tracks, and that defendant is entitled to the judgment of the court prescribing the location and character of any crossings so as to minimize the danger and inconvenience to defendant. The answer, however, does not suggest the number or location of the tracks that may be necessary for the purposes contemplated by the plaintiff. In conclusion, defendant prays for judgment for \$88,000 for the value of the property sought to be taken, and for loss, inconvenience, and damage that may be reasonably expected to result from the construction and use of the crossings claimed by plaintiff, including the increased cost of operating its tracks, their impaired value and the cost of half the expense of maintenance. Wherefore defendant prayed that plaintiff's suit be dismissed, and in the alternative for judgment for \$88,000.

The case was tried before a jury of freeholders, which found a verdict in favor of plaintiff for a right of way, excluding the

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fee, over defendant's rights of way, as prayed for in the petition and as indicated on the map annexed thereto, and fixing the value of said easement at \$855. From a judgment pursuant to the verdict, defendant has appealed.

The exception of no cause or right of action necessarily admits as true all of the allegations of fact contained in the petition. The petition shows that the crossings sued for are necessary to enable plaintiff to properly conduct its business as a common carrier and for the interest of the public. In connection with the map attached, the allegations of the petition show that plaintiff company intends to construct a long spur track, extending from its main line more than a mile in length to sawmills and other industrial plants located on the Calcasieu river. The ground of defendant's demurrer seems to be that the purposes disclosed by the petition are private, and not public, and therefore plaintiff has no legal right to expropriate the right of way in question. The cases cited by plaintiff seem to have been decided on the theory that a spur track, intended for the exclusive use of an individual or a collection of individuals, less than the public, is a private enterprise. In the case at bar the allegations of the petition, with the map annexed, disclose no such limited purpose. It is distinctly alleged that the right of way sought to be appropriated is "for the interest of the public" and to enable the plaintiff to properly conduct its business, as a common carrier. The same exception is pleaded in the answer and can be more satisfactorily considered in the light of the evidence adduced on the trial relative to the purposes of the proposed track construction.

If, as averred in the answer, the spur tracks of defendant are devoted to public use, plaintiff's proposed spur tracks intended for similar purposes will be likewise devoted to public use.

The evidence shows that switch and spur tracks are essential to every railroad company for the handling of freight in car load lots, and that such freight ordinarily constitutes nine-tenths of railroad traffic. The evidence further shows that plaintiff's spur tracks will accommodate a number of plants located on the river front, constituting from 60 to 80 per cent. of the industries of the city of Lake Charles, and will be open to all other business enterprises, present and future in the same vicinity.

Article 284 of the Constitution of 1898 empowered the railway commission "to require all railroads to build and maintain suitable depots, switches and appurtenances."

In 1900 the commission adopted an order providing that "no switches or spurs now in use in this state shall be removed or abandoned" without its consent. The Kansas City Southern Railway Company was fined \$1,000 by the commission for removing a spur 190 feet in length in violation of said order. In a suit to recover the fine thus imposed, this court held that the power to regulate railroads included the switches and spurs in use as a part of the railroad system. *Railroad Commission v. Kansas City Southern Ry. Co.*, 111 La. 133, 35 South. 487.

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In that case the spur was intended originally to receive more particularly the product of a sawmill which had been destroyed by fire.

By section 6 of Act No. 74, p. 103, of 1902, the right was given to any railroad company, which has acquired or may hereafter acquire the railroad or franchises of any other railway company, to expropriate property for the purpose of extending its line, and for branches, spur tracks, switches, sidings, etc.

This right of expropriating whatever is essential for the operation of railroads as common carriers existed by necessary implication under the laws previously enacted on the same subject-matter. There is no difference in principle between the main track of a railroad and its other tracks necessary to enable the company to properly carry on its business as a common carrier. Section 1479 of the Revised Statutes of 1870 confers on railroad corporations the right to expropriate lands "necessary for their purposes."

Article 272 of the Constitution of 1898 declares that all railroads, constructed and to be constructed in this state, are public highways, and all railroad companies are common carriers; and article 284 creates a commission and vests it with power and authority to make reasonable and just regulations to govern railroad freight and passenger tariffs and service, to correct abuses, and to prevent unjust discrimination. These constitutional provisions dedicate railroad tracks to public use and forbid their operation solely in the interest of individuals. In 1902 the Legislature expressly authorized railroad companies to expropriate land for switch and spur tracks, sidings, etc. Act No. 74, p. 103, of 1902.

Article 271 of the Constitution of 1898 provides in part as follows:

"Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination."

The argument that this right is restricted to main tracks is supported neither by reason nor authority. The crossing of a main track used for all kinds of traffic is more dangerous and more inconvenient than the crossing of a spur track used only for switching loaded and empty cars. If the one may be crossed, why not the other. The language of the Constitution is general, and embraces all kinds of tracks which may constitute the "road" or "railroad" of the company. If the contention of the defendant were adopted, it would enable one railroad in possession of spur tracks extending through a city or town to exclude all other railroads from the enjoyment of similar terminal facilities by refusing them the privilege of crossing its tracks. This doctrine would practically lead to the establishment of a monopoly in the business of switching freight in car load lots.

In the case at bar the proposed spur track of plaintiff company

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will reach nine industrial plants already in existence and will be open to public use under the Constitution and laws of this state.

The cases cited by defendant's counsel are scarcely analogous. In one, a railroad company sought to expropriate land for the purpose of enabling it to lay a lateral track to certain iron works, a few hundred feet distant, for the sole purpose of transporting freights to and from said plant. The court found that this was for the private accommodation of the railroad and steel works, and was not for a public use. 35 Am. & Eng. R. R. Cases, p. 531. In another it was held that a railway cannot exercise the right of eminent domain to establish a private station for an individual shipper. *St. Louis, I. M. & S. Ry. Co. v. Petty* (Ark.) 21 S. W. 884, 20 L. R. A. 434. In another, the track was intended for the private use of handling freight of a certain brick work. *Chicago & E. I. R. Co. v. Wiltse* (Ill.) 6 N. E. 49.

In *Butte, A. & P. R. Co. v. Montana Union R. Co.* (Mont.) 4 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508, many of the questions raised in this case were carefully considered and adjudicated. In that case the plaintiff sought to expropriate for a branch railway a portion of the right of way of defendant company and also 12 crossings, nearly all of them over spur tracks. The object of the branch line was to reach certain mines, mills and other industries. To the objection that the purpose was private, and not public, the Supreme Court of Montana said:

"The charter of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the public have a right to use it, it is a public way, although the number who have occasion to exercise the right is very small. * * * All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this"—citing *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

In *Re Chicago & N. W. R. Co.*, 87 N. W. 852, 56 L. R. A. 244, 88 Am. St. Rep. 918, the Supreme Court of Wisconsin said:

"A brief reference to some of the leading authorities will amply show that the fact that a spur track may run to a single industry does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served without discrimination."

We therefore are of opinion that the exception of no cause or right of action was properly overruled. The plea that defendant's spur tracks were devoted to public use, and therefore that plaintiff company had no right to expropriate crossings over the same, is without merit. The Constitution of 1898 expressly grants such right, which, based as it is on public interest and

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necessity, has been uniformly recognized and enforced under general statutes conferring the power of eminent domain. *Houston & S. Ry. Co. v. Kansas City, S. & G. Ry. Co.*, 109 La. 581, 33 South. 609.

Defendant company positively refused to entertain or discuss plaintiff's proposition to acquire the crossings in question, and the latter was left to locate the same without notice of defendant's objections as to number or locality. The answer complains that the number of crossings are excessive, but does not suggest what particular crossings are unnecessary. No specific issue of this kind was presented to the jury by the pleadings, but the issue was raised by the evidence submitted to the jury under the charge of the court. The jury, by their verdict, affirmed that all the crossings claimed by the plaintiff company were necessary for the operation of its spur tracks. The issue as to the location and number of crossings was one of fact, and we are not prepared, in the light of the evidence, to overrule in this respect the verdict of the jury. The location of a crossing is presumed *prima facie* to be correct. *Houston & S. R. Co. v. Railroad Co.*, 33 South. 609, 109 La. 585. Plaintiff company is equally interested with the defendant in securing a safe crossing. *Id.*

The remaining question is as to damages, and, as defendant owns no right of way beyond the ground covered by its tracks, plaintiff can take nothing beyond the privilege of crossing. This easement must be exercised jointly with the defendant company. The evidence shows that most of the inconvenience and delays apprehended by the defendant may be obviated by mutual agreement of the parties as to the operation of the two systems of spur tracks, the traffic over which will probably amount to but a few trips per day. Plaintiff will be inconvenienced as much as the defendant, and it will be to the interest of both to obstruct each other's use of the crossings as little as possible.

One element of damage is eliminated by plaintiff's declaration to the jury and to this court that it will be compelled to bear the expense of constructing and maintaining the crossings. The general principles of law applicable to the question of damages has been thus stated:

"No damages will be allowed for mere interruption or inconvenience occasioned in the transaction of its business, for increased liability to accident at the crossings, for being required by statute or ordinance to stop at the crossings," and the like. 3 *Elliott on Railroads*, § 1127.

The same writer says:

"The general rule is that the company whose line is crossed is entitled to recover compensation for everything which renders its property less valuable, causes it additional expense in restoring its property to a safe condition for use, renders it less able to transact its business, or makes the transaction of its business more expensive." *Id.* "It is the injury which depreciates the value of the property, whether by taking a portion of it or render-

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ing the portion left less useful." Id. note. "The damage must be the natural, necessary, and approximate cause of the taking." Id.

See, also, Lewis on Eminent Domain, § 489.

In the Montana case, cited *supra*, it was held that the defendants were not entitled to compensation or damages for the interruption or inconvenience occasioned to their business, and that the standard of compensation should be the reasonable value of the common use by plaintiff with defendants of the portions of the latter's right of way occupied by the crossings. *Butte, A. & P. R. Co. v. Railroad Co. (Mont.)*, 4 Pac. 232, 31 L. R. A. 302, 50 Am. St. Rep. 508.

The enormous demand of defendant for damages is based on estimates of its witnesses that the crossings will cause defendant the loss of one-third of the time of its switch crew and the employment of an additional switchman, or \$300 per month, and one-half the cost of maintaining the crossings, or \$800 per year, making a total of \$4,400 per year, equivalent to \$88,000, at 5 per cent. interest. The last element is eliminated by the proposition of the plaintiff to bear the entire expense of maintaining the crossings. The others are based mainly on anticipated increased danger of operation and necessity of stopping at and flagging crossings; all elements of inconvenience, rather than of damage.

We cannot understand how the probably limited use of the crossings by the plaintiff company could to any appreciable extent impair the usefulness of defendant's tracks. The resulting inconvenience could, as already stated, be minimized by agreement of the parties in interest. The necessary injury to defendant's property rights is, we think, covered by the amount allowed by the jury, whose verdict we see no reason to increase. In cases of this kind the quantum of compensation is always a difficult one, and perhaps it would be better to leave such questions to a commission of experts, rather than to the jury. But under our present system we must rely largely on the judgment of a jury of freeholders of the vicinage. When, as in the instant case, the jury have inspected the crossings and are presumably familiar with the practical operation of defendant's spur tracks and all the surroundings, we must necessarily attach great weight to their conclusions. In *Houston & S. R. Co. v. Railroad Co.*, 109 La. 581, 33 South. 609, we approved a finding of \$200 damages for the crossing of the main track of another railroad, involving the taking of a portion of the right of way not covered by the track. It is true that plaintiff in that case offered to abandon a contract right to cross defendant's Y at another place, provided it secured for a reasonable price the crossing over the main track. This offer was refused by defendant, and the abandonment of the reservation was not made a condition of the verdict and judgment.

In the instant case we think that the judgment should be

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amended by specifically imposing on the plaintiff the duty of constructing and maintaining the crossings at its own expense. The case was submitted to the jury on this theory, and this obligation, whether voluntarily assumed or arising from some rule of the railroad commission, is admitted by counsel for plaintiff.

The questions of the number, location, and necessity of the crossings were properly left to the jury.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by decreeing that plaintiff company shall construct and properly maintain the seven crossings described in the said judgment at its own cost and expense, and that as thus amended said judgment be affirmed; plaintiff to pay costs of appeal.

NEW ORLEANS & N. E. R. CO. v. SHACKLEFORD.

(Supreme Court of Mississippi, April 9, 1906.)

[40 So. Rep. 427.]

Carriers—Carriage of Passengers—Baggage.*—Where a carrier's station agent knew that a parcel checked as baggage was a sample case, and the carrier had accepted the sample case as baggage for two years, the carrier is liable for its loss or destruction in transit.

Same—Penalties.—Rev. Code 1892, § 3569, providing that if a railroad company carelessly or willfully injure or allow to be injured or lost any baggage, it shall be liable to the owner in a sum not less than double the amount of the actual damage, does not entitle a drummer to double damages for the loss of his sample case checked as baggage; the provision applying only to such baggage as is in a proper sense personal baggage.

Appeal from Circuit Court, Lauderdale County; R. F. Cochran, Judge.

"To be officially reported."

Action by Lee Shackelford against the New Orleans & Northeastern Railroad Company. From the judgment, cross-appeals are taken. Affirmed.

Fewell, Bozeman & Fewell, for appellant.

Miller & Baskin, for appellee.

WHITFIELD, C. J. On the 22d day of April, 1905, Lee

*See foot-notes appended to *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to *Little Rock, etc., Ry. Co. v. Records* (Ark.), 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664; *Yazoo & M. V. R. Co. v. Georgia Home Ins. Co.* (Miss.), 15 R. R. R. 766, 38 Am. & Eng. R. Cas. N. S., 766; *Battle v. Columbia, etc., R. Co.* (S. Car.), 14 R. R. R. 425, 37 Am. & Eng. R. Cas., N. S., 425.

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Shackleford, the appellee and cross-appellant herein, a drummer for the Melton Hardware Company, applied for and obtained from the agent of the appellant, the New Orleans & Northeastern Railroad Co., at Vossburg, Miss., a check for his sample case, having supplied himself with a 1,000-mile ticket over said road, and with his mileage ticket and a check for his sample case as baggage he boarded the train of the said appellant to come from Vossburg to Pachuta. He arrived at Pachuta about 12 o'clock at night. Shackleford went afterwards in search of his baggage, which had been checked, and was met by the agent of the appellant railroad company at Pachuta and informed that his baggage had been destroyed or robbed, and was asked by the agent to give him the amount of the contents of the said baggage or sample case, which he accordingly did, and the agent forwarded said statement of the contents and value of said sample case to a superior officer of the railroad company. Not having been paid for the sample case and contents, he afterwards, to wit, on the 22d day of September, 1905, instituted his suit before a justice of the peace for double the value of his property, as shown by the record. Thereupon a trial was had before said justice of the peace, and the market value of said property so lost and destroyed was shown to be \$78.09, and he obtained a judgment for \$156.18; the same being double the value of said property as claimed under section 3569 of the Revised Code of 1892, together with all the costs expended in said cause.

From this judgment there was an appeal taken by the New Orleans & Northeastern Railroad Company to the circuit court, in which court a trial was had, in which it was shown by the testimony of the plaintiff: That he was a drummer and had traveled over the railroad for two years, and that it was customary for the railroad company to check drummer's samples. That in this particular case the agent of the railroad company knew that it was a sample case at the time he gave him the check for the same, and he offered his check and read it to the jury, and that he had said sample case checked as baggage from Vossburg to Pachuta. He also stated: That the sample case was unlike any other receptacle used in traveling; that is, unlike a suit case or valise. That it was heavy, and at the time that the agent gave him a check for it he spoke of the weight of it, and the agent's testimony shows that he knew it was many times as heavy as a valise in which is carried personal effects. The sample case above mentioned was never delivered to the appellee, nor was any account ever made of it except to report its loss or destruction. Plaintiff asked the court to instruct the jury that, if they found for the plaintiff, their verdict should be double the fair market value of the property sued for, which instruction was by the court refused, and the jury were confined in the consideration of the damages suffered by plaintiff to the fair market value of said property. The jury found a

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verdict in behalf of plaintiff, and in accordance with the instruction of the court gave the plaintiff a verdict for the fair market value of the property sued for. Both the railroad company and the appellee, Shackleford, made a motion for a new trial, and the second ground for a new trial in behalf of the appellee, Shackleford, was failure to award double damages. This motion was by the court overruled; the court's idea being that plaintiff was not entitled to recover in any event any more than the fair market value of the property sued for.

The testimony makes it plain that the agent knew that Shackleford was a drummer and that this was a sample case and not a trunk or valise for ordinary baggage. The agent testifies that he did not know the contents of the sample case, but the jury might very fairly have inferred from his knowledge of the sample case that it was filled with some heavy samples of some sort. It also appears that the railroad company has been in the habit of checking this sample case as baggage for some two years heretofore. This, therefore, is a case unlike *Railroad Company v. Insurance Company*, 85 Miss. 7, 37 South. 500, in which we said: "The railroad knew nothing of these memoranda being in the trunk, and it is not a case where the railroad company has consented to receive or accept these memoranda as baggage knowingly or in accordance with any usage or custom of the railroad." This case falls precisely within the principles announced in the very able opinion of Battle, J., in *Kansas City, etc., Railroad Co. v. McGahey* (Ark.) 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111, and in *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208. In the first-named case the court say, at page 660 of 38 S. W., page 113 of 58 Am. St. Rep. (36 L. R. A. 781) "When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give any one concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them in that way. *Railway Co. v. Berry*, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212; *Minter v. Pacific R. R. Co.*, 41 Mo. 503, 97 Am. Dec. 288; *Slomon v. Great Western Ry. Co.*, 67 N. Y. 208; *Great Northern Ry. Co. v. Sherperd*, 8 Fx. 30; *Mauritz v. N. Y., etc., R. R. Co.* (C. C.) 23 Fed. 765; *Waldron v. Chicago, etc., Ry. Co.*, 1 Dak. 336, 46 N. W. 456; *Oakes v. Northern Pacific Ry. Co.*, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; *Hannibal R. R. Co. v. Swift* (U. S.) 12 Wall. 262, 20 L. Ed. 423; *Texas, etc., Ry. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 35; *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. 662."

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In the last-named case the facts were: A boy 18 years of age was employed as a traveling agent to sell goods by sample. He had two large trunks containing the samples and a valise for his personal baggage. The trunks did not present the appearance of ordinary traveling trunks. They were 30 inches long, 27 deep, and 24 wide. One was covered with oilcloth and the other was of wood. "He delivered the trunks to a baggage master at a railroad depot, and, when asked where he wanted them checked to, replied that he did not then know, as he had sent a dispatch to a customer at Fentonville to know if he wanted any goods; if not, he wanted them to go to Rochester, where he expected to meet some customers. Soon after he had them checked to Rochester, paying \$2, and receiving a receipt ticket for them headed 'Receipt Ticket for Extra Baggage and Dogs.' " The court held that the jury were authorized by these facts to infer that the baggage master understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares, and that he was not entitled to have them carried as ordinary baggage, and further held that the railroad company, having this notice, was responsible for the loss of the trunks and their contents." As in *Kansas City, etc., v. McGahey* it is further said: "Some courts hold that where a railroad company receives for transportation property which it is not bound by its contract with the passenger to transport as personal baggage, of which it has notice, it must be considered to assume, with reference to such property, the liability of a common carrier of merchandise (*Hannibal R. R. Co. v. Swift* (U. S.) 12 Wall. 262, 20 L. Ed. 423; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208), while others say that, if it receive the property under such circumstances as baggage, it will be responsible therefor as a common carrier, and will be estopped from denying that it was baggage (*Texas, etc., Ry. Co. v. Capps*, 2 Wilson, Civ. Cas. Ct. App. [Tex.] § 35; *Minter v. Pacific R. R. Co.*, 41 Mo. 503, 97 Am. Dec. 288; *Hoeger v. Chicago, etc., R. R. Co.*, 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271; *Chicago, etc., R. R. Co. v. Conklin*, 32 Kan. 55, 3 Pac. 762; *Butler v. Hudson River R. R. Co.*, 3 E. D. Smith (N. Y.) 571; *Railway Co. v. Berry*, 60 Ark. 433, 30 S. W. 764, 128 L. R. A. 501, 46 Am. St. Rep. 212). It seems to us the latter view is sustained by the better reason and weight of authority. But, be that as it may, the liability of the carrier for loss and damage in transportation in either case is the same."

The action of the court and the finding of the jury were correct on the direct appeal.

Section 3569, Rev. Code 1892, is in the following words: "If a railroad company carelessly or willfully injure or allow to be injured or lost any trunk or baggage, either by improper handling or otherwise, it shall be liable to the owner in a sum not less than double the amount of the actual damage." The court below refused to give a charge for double damage, and we think

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correctly. This statute is a highly penal statute, and was clearly meant to apply only to such baggage as in a proper sense personal baggage—articles of wearing apparel, etc., contained in the usual trunk carried for personal convenience as a receptacle for wearing apparel and the like. It was never in the mind of the Legislature to visit this penalty upon the railroad companies in a case like this, where the articles are not in a proper legal sense baggage, and where the liability of the railroad company arises from the fact that it knew the character of the articles, and consequently that they were not strictly baggage, and yet agreed and transacted to transport them as baggage; in other words, out of the estoppel arising against the railroad company in such case to deny that the articles were baggage and to be transported as such.

The result is that the judgment of the court below is affirmed on appeal and cross-appeal.

ABBOTT v. MILWAUKEE LIGHT, HEAT & TRACTION CO.

(Supreme Court of Wisconsin, Jan. 9, 1906.)

[106 N. W. Rep. 523.]

Eminent Domain—Taking of Property—Appropriation of Streets.*

—Under Rev. St. 1898, §§ 1862, 1863a, authorizing the formation of corporations for constructing and operating street railways, providing that municipalities may grant to any such corporation the use of streets or bridges within their limits for the purpose of laying tracks, and empowering such corporations to exercise the right of eminent domain, the use of a street by an electric railroad for interurban traffic is a burden not contemplated by the original taking of the land for street purposes, and the appropriation of the street by the railroad for that traffic constitutes a taking of private property for public purpose, for which the abutting owners are entitled to compensation.

Same—Measure of Damages.†—The measure of damages to abutting premises, for the appropriation of a street by an electric railroad

*For the authorities in this series on the question whether a street railway is an additional servitude, see foot-notes appended to *Morris v. Montgomery Traction Co.* (Ala.), 17 R. R. R. 413, 40 Am. & Eng. R. Cas., N. S., 413; *Hester v. Durham Tracton Co.* (N. Car.), 15 R. R. R. 830, 38 Am. & Eng. R. Cas., N. S., 830.

†For the authorities in this series on the subject of the measure and elements of damages recoverable in eminent domain proceedings, see foot-note appended to *Simons v. Mason City & Ft. D. R. Co.* (Iowa), 17 R. R. R. 469, 40 Am. & Eng. R. Cas., N. S., 469; *Union Ry. Co. v. Raine* (Tenn.), 17 R. R. R. 465, 40 Am. & Eng. R. Cas., N. S., 465; *Big Sandy Ry. Co. v. Dils* (Ky.), 17 R. R. R. 441, 40 Am. & Eng. R. Cas., N. S., 441; *Louisiana Ry. & Nav. Co. v. Xavier's Realty* (La.), 17 R. R. R. 104, 40 Am. & Eng. R. Cas., N. S., 104; foot-note appended to *Illinois, etc., Ry. Co. v. Freeman* (Ill.), 16 R. R. R. 360, 39 Am. & Eng. R. Cas., N. S., 360.

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for interurban travel, is the difference, at the time of the filing of the commissioners' award, between the market value of the premises with the road located upon it, and their market value freed from the use and burden of the road.

Appeal—Harmless Error—Erroneous Theory of Damages.—On the issue of damages to abutting property by the appropriation of a street by an electric railroad for interurban travel, the admission of evidence of the value of the premises in 1898, when the railroad first commenced its interurban business, and the giving of an instruction that the measure of damages was the difference between the market value of the premises just before the railroad commenced its interurban business upon the street, and its market value in 1904, when the award of damages was made by the commissioners, were not prejudicial to the railroad where the market value of the property, as shown by the evidence of the property, as shown by the evidence covering the period prior to the filing of the award, was substantially the same as it would have been without the burden of the railroad in 1904, when the award was made.

Same—Presumptions—Deliberations of Jury—Obedience to Instructions.—In proceedings by an electric railroad to condemn a right of way over a street for interurban travel, where the court repeatedly charged that the abutting owners were not entitled to any damages due to the conduct of a city street railroad business along the street in question, it would be presumed on appeal that the jury followed the charge and did not allow any damages for the operation of a city street railroad.

Same—Errors Reviewable—Instructions—Necessity of Specific Exceptions.—A general exception to the refusal of a number of requested instructions covering distinct propositions, presents nothing for review.

Appeal from Circuit Court, Waukesha County; James J. Dick, Judge.

Condemnation proceedings by the Milwaukee Light, Heat & Traction Company against Josephine Abbott. From a judgment for damages rendered by the circuit court on appeal from the commissioners' award, the traction company appeals. Affirmed.

This is a condemnation proceeding, instituted by the defendant company for the purpose of permanently acquiring the right of way for an interurban railroad over the property described in the petition. It appears that the defendant is a corporation duly organized under the laws of Wisconsin and authorized to construct, maintain, and operate "by electricity or other power, street railways for the transportation of passengers, mail, express, merchandise, and other freight," in the state of Wisconsin. As such corporation, by grant from the city of Waukesha, it acquired the right to construct, maintain, and operate a street railroad upon Lincoln avenue, a street of this city, and to operate an interurban street railroad business over

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this street. Under the rights so granted, the defendant built a single street car track upon Lincoln avenue in 1898, and thereafter maintained and operated a combined city and interurban street railroad business thereon until the year 1900, when, under authority and license duly granted by the city of Waukesha, it changed the railroad from a single track to a double track road. It also appears that the city railroad service consisted in running interurban cars or trains over the tracks, carrying interurban passengers, and that the same cars, at the regular fare for doing a city street railroad business, afforded transportation to persons within the limits of the city. The cars made regular stops at crossings, as required by the charter, and no other cars than interurban cars were used for the transportation of passengers within the city limits, and none of such cars were at any time devoted exclusively to the street railroad business within the city. The petition alleges that this proceeding is instituted "to condemn and permanently appropriate all the rights of property which would entitle the owners or persons interested in the lots fronting and abutting upon said Lincoln avenue ——— to damages by reason of the construction, maintenance, and operation on said avenue ——— of the double track railroad authorized by your petitioner's said articles of incorporation and said franchise and as the same has been heretofore constructed and operated." Appraisers were duly appointed under this proceeding and they, as required by law, filed a report on September 19, 1904, of their awards of damages with the clerk of the circuit court. Both parties appealed from such award to the circuit court for Waukesha county, where a trial was had before a jury upon the issues presented on such appeal, and a verdict was rendered awarding plaintiff the sum of \$512.50 damages. Judgment was accordingly entered on January 27, 1905, adjudging that plaintiff recover from the defendant the sum of \$614.46, as damages and for costs and disbursements. From this judgment defendant appeals, alleging that the court erred in receiving evidence which was objected to by it, and in giving to the jury an incorrect rule of law under which the damages were to be found by them.

Ryan, Merton & Newbury (Clarke M. Rosecrantz, of counsel), for appellant.

Tullar & Lockney, for respondent.

SIEBECKER, J. (after stating the facts). The principal contention of appellant is that the only ground, if any exist, upon which respondent can recover is for damages she has suffered, as an abutting property owner, on account of the running of interurban trains or cars over the street railroad tracks placed on Lincoln avenue. As shown in the statement of facts, appellant has been and is now operating an interurban street railroad, extending from the city of Milwaukee to and into the city of Waukesha over the street in question, and by this proceeding

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it undertakes to condemn, and permanently appropriate, all the rights of property which entitle persons interested in property along the right of way to damages caused by the operation and maintenance of an interurban street railroad business, on its double track railroad upon this public highway. It is claimed that in this proceeding no damages, for the taking and appropriating of a portion of the street as a right of way for the location of its tracks, should be allowed the property owners affected, since the city has granted the right to defendant to lay such tracks within the street, for conducting a city street railroad business, and because such occupation of the street by the tracks is not a servitude additional to those contemplated by the original dedication or taking of the land for the purposes of a public highway. This claim is not well founded. It fails to distinguish between the appropriation by a private corporation of a part of a street for the purpose of conducting a transportation business, and the general uses of a highway "to accommodate the public travel, (and) to afford citizens and strangers an opportunity to pass and repass, on foot or in vehicles, with such movable property as they may have occasion to transport." *Carli v. Stillwater Street Railway & Transfer Co.*, 28 Minn. 375, 10 N. W. 205, 41 Am. Rep. 290.

This court has held that the operation and maintenance of street railroads upon the streets within the limits of a city, for the purposes of accommodating the public travel by aiding in transporting persons from place to place on such streets, is a burden contemplated by the original taking of the lands for street purposes, and that the owner of the land occupied by the street is not entitled to damages additional to those awarded to him for the original taking of it for the purposes of a public highway. *Hobart v. Milwaukee City Railroad Co.*, 27 Wis. 194, 9 Am. Rep. 461; *La Crosse City Railway Co. v. Higbee*, 107 Wis. 399, 83 N. W. 701, 51 L. R. A. 923. This use of the streets is classed as one incident to the public easement and is not deemed to be an appropriation of any portion of the street or soil within its boundaries for any purposes other than those to which it is devoted by the public generally. It is also well recognized that the grant to a person or corporation of a right to occupy the land within a street for any public purpose, whereby it is devoted to purposes other than those of a public highway, is an additional servitude upon the soil for which the owner is entitled to compensation. *Chicago & Northwestern Railway Co. v. Milwaukee, Racine & Kenosha Electric Railway Co.*, 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. Rep. 136, and cases cited; *Zehren v. Milwaukee Electric Railway & Light Co.*, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844; *La Crosse City Railway Co. v. Higbee*, *supra*. Within the scope of this principle it was held that defendant's right to maintain and operate an interurban street railroad business upon the street in question constituted a right different from

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the right of passage by the public and that such grant gave it the exclusive privilege, conformably to its grant and the regulations prescribed by the municipality, of using the portion of the street necessary for the conduct of its business and that for this it would be required to make compensation to the several abutting property owners. *Younkin v. Milwaukee Light, Heat & Traction Co.*, 120 Wis. 477, 98 N. W. 215. Since this use is in no way predicated on the public right to the use of the street, defendant can so occupy it under no other authority than the one granted to it as an agency for conducting a transportation business, in accordance with which it may condemn property to secure a right of way. In these respects its rights and liabilities are like those of a commercial railroad and when to conduct its interurban railroad business it appropriated the street in front of plaintiff's property it was a taking of plaintiff's private property for a public purpose, for which she is entitled to compensation under the rules governing the exercise of this right by commercial railroads. The extent of such rights and liabilities is established in many decisions of this court, among which may be cited: *Ford v. Chicago & Northwestern Railroad Co.*, 14 Wis. 609, 80 Am. Dec. 791; *Pomeroy v. Milwaukee & Chicago Railroad Co.*, 16 Wis. 640; *Buchner v. Chicago, Milwaukee & Northwestern Railway Co.*, 60 Wis. 264, 19 N. W. 56. In its legal effect the proceedings instituted by the defendant company is an assertion by it as an interurban street railroad of the rights granted by sections 1862 and 1863a, Rev. St. 1898, under which, pursuant to the privileges granted by the city of Waukesha to occupy the street in question, it may acquire the right of way for its road and thus, for the purpose of conducting its transportation business, obtain a perpetual interest in the real estate of the plaintiff. It is obvious that this action of the defendant is not based on any rights or privileges which have been bestowed on it by the city for affording facilities to persons to pass and repass on the streets as a public highway, but that it is taking property under the power of eminent domain, for which it must indemnify plaintiff. This conclusion negatives the main contention of the defendant on this appeal.

Error is assigned upon the admission of testimony bearing on the measure of damages, and on the giving of an instruction to the effect that the measure of damages was the difference between the market value of plaintiff's abutting property just before the defendant commenced conducting its interurban business upon the street, and its market value in September, 1904, when the award of damages was made by the commissioners. The defendant commenced operating this railroad in 1898. The true rule is as claimed that the measure of damages is the difference, if any, at the time of the filing of the commissioners' award, between the market value of the premises with the road located upon it, and the market value at that time freed from the use and burden of the road. The erroneous statement of

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the rule by the court to the jury and the admission of evidence of value in 1898, did not, however, prejudice defendant under the circumstances shown, for the reason that the market value of the property, as shown by the evidence covering the period prior to the filing of the award, was substantially the same as it would have been in September, 1904, without the burden of the railroad. *Lyon v. Green Bay & Minnesota Railway Co.*, 42 Wis. 538; *West v. Milwaukee, Lake Shore & Western Railway Co.*, 56 Wis. 318, 14 N. W. 292; *Milwaukee & Mississippi Railroad Co. v. Eble*, 3 Pin. 334.

It is also claimed that under the directions given the jury they probably included whatever damages plaintiff suffered by reason of the operation of a city street railroad in this street. An examination of the instructions reveals that the court expressly and repeatedly instructed the jury that plaintiff was not entitled to any damages due to the conduct of such street railroad business. It must be presumed that the jury followed the instructions of the court in this particular. We do not consider the damages to be excessive, as claimed by the defendant. The evidence adduced abundantly supports the verdict.

A large number of instructions requested by defendant and covering a number of distinct propositions were refused by the court; to these refusals a general exception was taken. Under such circumstances the exception does not avail to present questions for review. *Lowe v. Ring*, 123 Wis. 370, 101 N. W. 698. The exceptions taken to the instructions given and preserved and argued on this appeal are hereinbefore sufficiently covered in so far as they require specific consideration. They have been examined, and we find no prejudicial error in the record.

Judgment affirmed.

GROSSMAN v. HOUSTON, O. L. & M. P. RY. CO.

(Supreme Court of Texas, April 25, 1906.)

[92 S. W. Rep. 836.]

Eminent Domain—Remedies of Property Owners—Limitations.—

Where a railroad was constructed in a street and was therefore sold to another corporation which used it by operating engines of greater weight and hauling trains of greater length than had previously been run and instead of carrying passengers used the road for the transportation of freight both day and night, increasing the discomfort and annoyance of an owner of abutting property, his cause of action for damages did not arise until the change in the use to which the road was put.

Same—Occupation of Street—Elements of Damage—Personal Inconvenience.*—The personal inconvenience and discomfort occasioned to the owner of abutting property by the operation of a railroad in the street gives rise to no cause of action.

Same—Depreciation in Value of Property.*—Under Const. art. 1, § 17, declaring that no person's property shall be taken for public use without compensation, an owner of a lot which is caused to depreciate in value by the operation of a railroad in the street is entitled to recover damages.

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by Julius Grossman against the Houston, Oak Lawn & Magnolia Park Railway Company. A judgment for plaintiff was reversed by the Court of Civil Appeals (89 S. W. 312), and plaintiff brings error. Reversed with directions to enter judgment for plaintiff.

Brashear & Dannenbaum, for plaintiff in error.

J. A. Read and Wilson & Jackson, for defendant in error.

BROWN, J. Grossman owns and resides upon a lot on Com-

*For the authorities in this series on the subject of the rights of abutting owners as affected by the construction and operation of railroads in streets, see foot-notes appended to *Coker v. Atlanta, etc., Ry. Co.* (Ga.), 17 R. R. R. 399, 40 Am. & Eng. R. Cas., N. S., 399; foot-notes appended to *Camden Interstate Ry. Co. v. Smiley* (Ky.), 15 R. R. R. 94, 38 Am. & Eng. R. Cas., N. S., 94; foot-note appended to *Little Rock, etc., R. Co. v. Newman* (Ark.), 14 R. R. R. 448, 37 Am. & Eng. R. Cas., N. S., 448.

As to what are, and are not, the elements of damages sustained by abutting owners from the construction or operation of railroads in streets, see foot-notes appended to *Hester v. Durham Traction Co.* (N. Car.), 15 R. R. R. 830, 38 Am. & Eng. R. Cas., N. S., 830; foot-notes appended to *Mordhurst v. Ft. Wayne & S. W. Traction Co.* (Ind.), 15 R. R. R. 122, 38 Am. & Eng. R. Cas., N. S., 122; foot-notes appended to *Harrington v. Iowa Cent. Ry. Co.* (Iowa), 15 R. R. R. 97, 38 Am. & Eng. R. Cas., N. S., 97; foot-note appended to *Smith v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 457, 37 Am. & Eng. R. Cas., N. S., 457.

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merce street in the city of Houston, which he had occupied with his family for about 10 years before the institution of this suit on the 24th day of December, 1902. The residence of the family was situated near to the line of the street, and the street is about 60 feet wide. In 1889, the Houston, Belt & Magnolia Park Railway Company was organized under the general railroad laws of this state, and, early in the year 1891, with the consent of the city council of the city of Houston, that company built and completed its line of road upon Commerce street, in front of the property now owned by Grossman; and that company operated the line of road over the said street from 1891 until the date of the sale by a receiver under the judgment of the court in the year 1901, when the Houston, Oak Lawn & Magnolia Park Railway Company purchased the same. Prior to the purchase of the said road by the defendant in error, it was operated by the company which built it, and the receiver which controlled it; its principal business was transporting passengers to and from points in or near to the city of Houston; its heaviest business being the transportation of passengers to and from a local park. Its business was very heavy during the summer time, and the dummy engines which it used emitted coal smoke and cinders just as such engines would naturally do, and said engines were equipped with shrill whistles, the sound of which was disagreeable. The train of cars which passed along the road would cause a sensible vibration, noticeable by those who inhabited the adjoining property. The track was lawfully and properly constructed on said street, which caused no damage to Grossman's property. After the purchase of the road by the defendant in error, it began to operate it by using engines of greater weight and hauling trains of greater length than had been run over the road prior to that time. Instead of carrying passengers over the line of road, as had been formally done, the present owner used it chiefly for the transportation of freight; and the road is used day and night. The discomfort and annoyance to those occupying the abutting property have been greatly increased, the market value of such property reduced, and the plaintiff in error has, from the use of the road by the present company, suffered damage in the sum of \$500 for reduction in the value of his lot, \$100 for discomfort suffered by his wife, and \$25 for like injury to himself. At the trial in the district court, judgment was rendered for Grossman for the sums above stated, from which judgment appeal was taken to the Court of Civil Appeals, and that court reversed the judgment of the district court, and rendered judgment in favor of the railway company, upon the ground that the claim for damages was barred by the statute of limitations of two years.

Under articles 4426 and 4438 of the Revised Statutes of 1895, the Houston, Belt & Magnolia Park Railway Company had the right, with the permission of the city council of the city of Houston, to construct its railroad track upon Commerce street; and, the track being properly built and the trains thereon prop-

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erly operated, Grossman, the abutting property owner, had no cause of action against that company. *Gulf, W. T. & P. Ry. Co. v. Goldman* (Tex. Civ. App.) 28 S. W. 267; *City of Houston v. Parr* (Tex. Civ. App.) 47 S. W. 393; *Water Works v. Kennedy*, 70 Tex. 236, 8 S. W. 36; *Backhouse v. Bonomi*, 9 H. L. Cas., 512. Applications for writs of error were made to this court in *Railway Company v. Goldman*, and the *City of Houston v. Parr*, each presenting the question of limitation as is presented in this case, and the applications were refused.

In the case of *Railway Company v. Goldman*, *supra*, the right of way had been acquired from Goldman, and the railroad constructed, but in constructing the embankment, a ditch was left, in which water accumulated, causing sickness in the family and a consequent depreciation in the value of the land. Suit being brought to recover for the depreciation of the land, and for damages on account of the sickness more than two years after the construction of the railroad, the latter pleaded the statute of limitations, but the Court of Civil Appeals held that the statute did not apply, announcing its conclusion in these words: "The defendant had the right to use the earth, acquired as a right of way, in the construction of its embankment, being held to the exercise of due care and skill to avoid inflicting injury upon others. By the mere use of the earth and leaving of the ditch, it took no part of appellee's estate for which it had not compensated him. It simply created a condition of things, which, afterwards, operating with other agencies, wrought consequential damage to appellant, arising at intervals. Thus the sickness in the family resulted, and, from unwholesome conditions surrounding it, the farm became less valuable. While that deterioration in value after it took place was permanent, it must be borne in mind that the value of the estate was not at once partially destroyed by the act of the defendant, but was lessened as a consequence of the unhealthful situation eventually produced." The same doctrine was forcibly illustrated in the case of *Water Works v. Kennedy*, *supra*, in which the court said: "When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon the act, it is held that the cause of action does not accrue until the injury is sustained." The court then cites *Backhouse v. Bonomi*, and comments upon and approves it, which fully sustains the proposition. But the court distinguishes the case then under consideration by showing that it does not come within the rule announced, because the act complained of was unlawful; therefore, the cause of action arose at the time the act was done.

The Court of Civil Appeals cites and relies upon *Lyles v. T. & N. O. Ry. Co.*, 73 Text. 95, 11 S. W. 782, in support of its judgment. In that case the court said: "It is not a case in which no actual injury was done when the tracks were laid and in which no action would lie until some consequential injury resulted, but is a case in which a cause of action existed, and on which the measure of relief was just as broad as the lapse

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of years could make it." The distinction between the Lyles Case and the case now before us is quite clear, and the rule applied in that case is not applicable to the facts of this. The damages sued for in this case did not arise until within two years prior to the institution of this suit, and did not arise out of the act of constructing the railroad track in the street, but from the use that was subsequently made of that track and is strictly in the line of the case of *Railway Company v. Goldman*, before cited. The Court of Civil Appeals erred in holding that the claim for damages was barred by the statute of limitations. The personal inconvenience and discomfort to Grossman and his wife caused by the lawful and proper operation of the trains on the road does not give a right of action for damages against the railroad company. *Railway Co. v. Shaw*, 92 S. W. 30, 15 Tex. Ct. Rep. 129. But the depreciation of the value of Grossman's lot is a damage to his property for which he may recover under article 1, § 17, of the Constitution.

It is ordered that the judgment of the Court of Civil Appeals be reversed, and that this court will now enter judgment upon the findings of the trial court that the plaintiff in error, Grossman, have and recover of and from the railway company the sum of \$500 for damages to his property, and all costs of the district court; that the railway company have and recover of and from Grossman all costs of the Court of Civil Appeals, and of this court.

SHEPARD v. SUFFOLK & C. R. Co.

(Supreme Court of North Carolina, Feb. 27, 1906.)

[53 S. E. Rep. 137.]

Railroad—Construction—Cattle Guards.—Revisal 1905, § 2801, requiring railroads, passing through inclosed lands, to construct and maintain cattle guards at the point of entrance upon and exit from said lands, applies to lots in a town and to land in stock law territory, as well as to tracts of land in the country and in territory in which the stock law is not in force.

Same—Rights in Land—Deeds.*—A deed conveying land to a railroad for a right of way gives the railroad no more rights than it would have acquired to such land by condemnation.

Appeal from Superior Court, Chowan County; Ward, Judge.

Action by W. B. Shepard against the Suffolk & Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*For the authorities in this series on the question as to what title is required, by deed or condemnation proceedings, in land conveyed or condemned for a railroad right of way, see foot-note appended to *Walker v. Illinois Cent. R. Co.* (Ill.), 18 R. R. R. 439, 41 Am. & Eng. R. Cas., N. S., 439.

Shepard v. Suffolk & C. R. Co*Pruden & Pruden*, for appellant.*C. S. Vann*, for appellee.

CLARK, C. J. The plaintiff owned a lot of two acres in the town of Edenton, which was inclosed and used by him to pasture cows and horses. He conveyed a right of way through it to defendant railroad company, who tore down the fence beyond the right of way and failed to erect a cattle guard at the entrance and exit to the lot. The plaintiff sued for damages to the fence and for failure to erect cattle guards. There was evidence that the rental value of the lot was reduced from \$4 to \$3 per month by the failure to erect such guards. It was in evidence that the ordinances of the town forbade live stock from running at large therein. The defendant asked the court to charge that in view of such ordinance the defendant was not required to erect cattle guards at the entrance to and exit from the plaintiff's lot. The court refused to so charge, and the exception to such refusal is the sole point presented, for the defendant does not resist that part of the verdict which assessed \$15 for damages to the fence, but appeals from the assessment of \$26 damage from failure to put in the cattle guards.

Revisal 1905, § 2601, reads as follows: "Every incorporated company owning, operating or constructing, or which shall hereafter own, operate, or construct, or any company which shall be hereafter incorporated and shall own, operate, or construct any railroad passing through and over the land of any person now inclosed or which may hereafter become inclosed, shall at its own expense construct and constantly maintain in good and safe condition good and sufficient cattle guards at the point of entrance upon and exit from said inclosed lands, and they shall also make and keep in constant repair crossings to any plantation road thereupon. Every such corporation which shall fail to erect and constantly maintain such cattle guards and crossings shall be guilty of a misdemeanor and fined in the discretion of the court, and further liable in action for damages to the party aggrieved." The defendant contends that this statute does not apply to a lot in town nor to stock law territory, but there is nothing in the statute that discriminates between town and country, nor between stock law and non-stock law territory, and the courts are not empowered to write any discrimination into the statute. The adoption of the stock law does not abrogate in such locality a general statute or rule of law. *Roberts v. Railroad*, 88 N. C. 562. The fact that stock are not allowed to run at large in Edenton made it all the more imperative that the defendant should put up cattle guards where its track passed through the fences of plaintiff's pasture, else stock could not be confined therein and the pasture would become worthless for such purpose.

The defendant contends that it will be a burden if railroad companies are compelled to put cattle guards wherever they cross the line of every small lot in town. Few lot owners will demand that this be done, and if it should prove an unjust burden there

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is a ready remedy by application to the Legislature to amend the statute. Here, if the plaintiff's two-acre pasture were in the country, it would not be contended the defendant should not put in cattle guards. We fail to perceive any reason why the plaintiff's pasture shall be destroyed with impunity, by failure to put in a cattle guard to keep in his cows and horses, merely because the pasture lies inside the town limits. The deed to the right of way gives the defendant no more rights than he would have acquired by condemnation. *Hodges v. Telegraph Co.*, 133 N. C., 233, 45 S. E. 572.

No error.

BEERS v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit, August 1, 1905.)

[141 Fed. Rep. 957.]

Injunction—Alternative Relief—Laches.—To authorize a decree for damages as an alternative for an injunction, a case in equity must be made, and laches which would defeat the right to an injunction will also defeat the right to the alternative relief.

Eminent Domain—Remedies of Property Owners—Injunction—Damages—Laches.*—A property owner, who, with knowledge of a city ordinance requiring a railroad company to elevate its track on a street in front of his property, the necessary result of which would be to occupy the entire street, permits the work to be done and a large amount of money to be expended in the same by the company, is chargeable with laches which will defeat his right to an injunction or to an award of damages in equity as an alternative relief.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The facts are stated in the opinion.

Frank Crozier, for appellant.

Chas. B. Keeler, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

The bill in the Circuit Court was to enjoin the maintenance by appellee of its elevated railway tracks in a street in front of the appellant's lots, and to compel the removal of the tracks thus elevated. The bill asks, in addition, that appellee may be decreed to pay to appellant the damages sustained by reason of the trespass on his lots, and render reasonable compensation for the use thereof, and for other relief. The bill is predicated upon the theory that the street, occupied by appellee's elevated tracks, is a public street, and that though the occupation was under an or-

*See foot-notes appended to *Kakeldy v. Columbia & P. S. R. Co.* (Wash.), 17 R. R. R. 480, 40 Am. & Eng. R. Cas., N. S., 480.

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dinance regularly passed by the Council of the City of Chicago, the City of Chicago was wholly without power to devote such street to the purposes of track elevation; wherefore, the appellant, an abutter on the street, dependent upon such street for ingress and egress, and cut off from the same by the elevation in question, is entitled to an order removing the embankment, or (as stated in oral argument at bar) to an ascertainment in equity of the damages sustained, and an order for their payment.

Among other defenses to the bill thus stated, the appellee asserts that appellant has been guilty of laches. The bill was dismissed for want of equity by the Circuit Court.

Appellant is the owner of lots fronting on Bloomingdale road, occupied since 1872 by the tracks of the appellee's railroad. Under an ordinance of the city, of February 21st, 1898, requiring an elevation of appellee's tracks, work was begun in March, 1898, and finished during that year. The work thus ordered, carried appellee's elevation in front of, and beyond appellant's lots; but in front of appellant's lots, the elevation was already descending to the surface, so that it constituted an embankment variously estimated as averaging from two and one-half feet, to eight feet in height, on either side of the base of which in the street was width sufficient to afford ingress to, and egress from, appellant's lots.

January 13th, 1902, the city passed another ordinance, ordering the extension of the elevation westward. The effect of this ordinance was to raise the earth embankment, opposite appellant's lots, to the standard height of twelve feet, and to extend the base of the embankment to the full width of the street. Both this ordinance, and the preceding one, provided that the side slopes and lateral dimensions of the embankment should be determined by the natural angle of repose of the material used; and there is no averment or evidence, that in extending the width of the base of the embankment, this natural angle was exceeded. Work under this later ordinance was commenced in April, 1902, and prosecuted continuously up to August 2nd, 1902, when the bill was filed. At the time of filing the bill, the embankment was practically completed. In constructing the first elevation the railroad, approximately, expended seven hundred and fifty thousand dollars, and the second elevation cost upwards of two hundred thousand dollars, in addition to which a sum of over one hundred thousand was contracted, by appellee, for structural steel for subway viaducts on the line of the road covered by the new embankment.

The appellant resides at Geneva, Illinois, distant from Chicago less than one hundred miles. He became the owner of these lots in 1893. He was called as a witness on his own behalf in the Circuit Court, but did not testify respecting either his knowledge or his ignorance of these ordinances; or his knowledge or his ignorance of the elevation work done under them. And the sole averment in the bill, relating to knowledge or ignorance, is that on or about the 6th of July, 1902, appellant's attention was first called to the fact that appellee was erecting the second embank-

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ment. Even this was not under oath, for the bill does not seem to have been verified.

That laches is shown on the face of this record seems to us to be without doubt. The ordinance of 1898, four years before the bill was filed, established the policy of the city in the way of requiring appellee, within the city limits, to elevate its tracks. No one knowing this fact could have doubted that that ordinance, though not extending at that time the embankment in full dimensions in front of appellant's lots, would be followed, in time, by an embankment that would be of full dimensions. The ordinance showed what the character of that embankment would be—its standard height of twelve feet, and the angle of repose—and that this would result in occupying the whole of the street in front of the lots as a base for the embankment.

Under these circumstances, the ordinance of January, 1902, could have been no surprise to the owners of abutting lots. And in the absence of distinct evidence, from the appellant himself, that he was ignorant, either of the passage of the ordinance in January, or the commencement of the work in April, we are not justified in believing otherwise than that he had knowledge; and though the burden of showing laches may have been on the appellee, in the first instance, that burden is fully met, when the facts disclosed create the probability that the complaining party has had such knowledge as, under the circumstances named, would constitute laches.

But it is urged in argument, that though laches appear, whereby a right to an affirmative injunction no longer exists, the alternative right of determining, in equity, appellant's damages, and ordering its payment, is not thereby lost. The proposition is not sound. The ascertainment in equity, as an alternative for an injunction, of the damages suffered, is only the form that a decree may take, when, within the discretion of the court an affirmative injunction ought not to be issued. But for a decree of this form, as well as for a decree for an injunction, there must first be established a case in equity. Until that time the party obtains no foothold in equity. Laches prevents such foothold. Laches being disclosed, no cause in equity exists—the party being already remitted, at the time of the filing of the bill, to his remedies at law.

The decree appealed from is affirmed.

SOUTHERN RY. CO. v. CASSELL.

(Court of Appeals of Kentucky, March 14, 1906.)

[92 S. E. Rep. 281.]

Carriers—Tickets—Conditions—Identification of Passenger.—A railway ticket, signed by the purchaser, and reading: "I agree to identify myself as the original purchaser of this ticket, by signature or otherwise, to the satisfaction of the conductors, agents, or representatives of the railway companies over whose lines this ticket reads whenever called upon to do so"—does not require the passenger to satisfy the conductor of his identity as the original purchaser, but only requires identification by such proof as would satisfy the mind of a reasonable, conscientious, and prudent man selected by the parties to pass on the question.

Same—Breach of Contract—Actions—Venue.—Civ. Code Prac. § 73, localizing certain actions and pertaining to common carriers exclusively, one part relating to actions on contract to carry property, the other to actions for torts, either injury to the person of a passenger, or for injury to the person or property of another, does not include actions on contracts to carry passengers.

Same.—Under Civ. Code Prac. § 72, localizing certain actions, applicable to all corporations, except as expressly excluded by other sections, and providing that actions against corporations on contract may be brought in the county in which the contract was made, where a contract for carriage of a passenger over connecting lines of railroad was made by the initial carrier in a certain county on behalf of the connecting carrier, and thereafter ratified by the latter, which undertook to carry it out, the circuit court of the county had jurisdiction of the connecting road, in an action against both roads for breach of the contract.

Same—Ejecting Passenger—Excessive Damages—Evidence.—Where plaintiff was wrongfully ejected from defendant's train about midnight, at a strange town, for failure to satisfy the railroad conductor of his identity as original purchaser of a ticket presented by him, the evidence showing that the conductor's manner was insolent, highhanded, and unnecessarily humiliating, that he acted hastily and without proper consideration or prudence, and that he cursed plaintiff and otherwise treated him harshly in the presence of the passengers on the car, a verdict for \$1,000 for plaintiff was not so excessive as to indicate passion or prejudice on the part of the jury.

Appeal from Circuit Court, Anderson County.

"To be officially reported."

Action by H. B. Cassell against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willis & Todd, for appellant.

Charles Carroll and *W. H. Morgan*, for appellee.

O'REAR, J. Appellee bought a round-trip ticket at Lawrence-

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burg, Ky., from an agent of the Southern Railway Company in Kentucky, for a continuous passage each way between Lawrenceburg and St. Louis, traveling from Lawrenceburg to Louisville over the Southern Railway in Kentucky, and between Louisville and St. Louis over the Southern Railway. The two companies are represented to be distinct corporations. By reason of a mistake of the conductor on the passenger train of the Southern Railway Company, appellee's identification as the original purchaser of the ticket was rejected, and, as he did not have the means of paying his fare, he was put off the train about midnight at a strange town in Illinois. There was evidence that the conductor's manner was insolent, highhanded, and unnecessarily humiliating. Appellee sued both companies to recover damages for his wrongful ejection from the train.

One of the conditions of the ticket which was signed by the purchaser was this agreement: "I agree to identify myself as the original purchaser of this ticket, by signature or otherwise, to the satisfaction of the conductors, agents, or representatives of the railway companies over whose lines this ticket reads whenever called upon to do so." The conductor, when taking up the ticket on the return trip from St. Louis, asked appellee to sign his name on the back of the ticket, which he did in the conductor's presence. He was required to again sign his name, but on a separate piece of paper, which he did. He was inquired of as to his name, place of residence, and the sum he paid for the ticket, all of which he answered truthfully. The conductor was of opinion that appellee was mistaken as to the amount paid for the ticket, saying it was too much, which seemed to confirm his suspicion aroused by what he deemed a dissimilarity in the handwriting in which the original signature and the ones made in his presence had been executed. That he was not satisfied the one way or the other from the handwriting alone is shown by his asking the other questions. That his doubts were resolved against appellee on hearing his answer as to what he paid for the ticket is evidenced by the response he made, which was the only fact detailed to him that he evinced a knowledge of himself upon which he convicted appellee of falsehood, and as being an impostor. We have seen that he was mistaken. He evidently did not know the correct rate between Lawrenceburg and St. Louis. Assuming to act upon insufficient knowledge on the point was to resolve a statement of appellee, which the conductor did not know to be untrue, into a doubt, and then to resolve the doubt against the passenger. Appellee was unable to produce any other evidence of his identity except an unused ticket which he had bought in Texas on the trip, and which he had signed when he bought it. He also had a valise with a tag on it on which his name was written, and which the conductor saw, according to appellee's evidence. In addition, appellee testified that he told the conductor that he had 65 cents, which he offered him to pay for a telegram to the station agent at Lawrenceburg, Ky., to inquire whether appellee did not buy a

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ticket corresponding with the one offered on the date it bore; but the conductor refused to send the telegram. There was some evidence tending to show that the conductor's action was not unreasonable or oppressive. Under these facts the court instructed the jury that it was the duty of the plaintiff to identify himself as the original purchaser of the ticket presented by him by such proof as would have satisfied the mind of a reasonable, conscientious, and prudent man selected by the parties to pass upon the question. This instruction was based upon *B. & O. S. W. R. Co. v. Hudson*, 80 S. W. 454, 25 Ky. Law Rep. 2154. The contract in that case was substantially the same as the one in the case at bar. The contract, properly construed, is not that the purchaser will satisfy the conductor of his identity as original purchaser. No quantity of evidence might have done that. For after all had been done that could have been, and all that any reasonable person would have required, still the conductor in this instance might not have been satisfied, and would have had the right under appellant's view of the law to have refused the ticket and rejected the passenger under circumstances most unreasonable and unwarranted. Such could not have been the intention of both parties in entering into the contract of carriage. We adhere to the rule adopted in *Hudson's Case*, *supra*.

At the conclusion of the evidence the trial court gave a peremptory instruction to the jury to find for the defendant the Southern Railway Company in Kentucky. Thereupon appellant Southern Railway Company entered its motion for a nonsuit upon the ground that the Anderson circuit court had not jurisdiction of it in this action. The two companies joined as defendants. Only one of them, the Southern Railway Company in Kentucky, operated a railroad in Anderson county; it being alleged, and not controverted, that appellant did not own or operate any railroad in Anderson county. The question of jurisdiction was preserved by appellant by unobjectionable practice, and the question is properly presented whether the Anderson circuit court had jurisdiction of appellant without its codefendant being joined in the action.

Sections 72 and 73, Civil Code of Practice, localized certain actions. The latter pertains to common carriers exclusively. It is divisible into two parts—one relating to actions upon contracts to carry property; the other, to actions for torts, either injury to the person of a passenger, or for injury to the person or property of another. The section does not include actions upon contracts to carry passengers; nor does any other section of the Code expressly embrace such action. But section 72, Civil Code of Practice, which applies to all corporations, except as expressly excluded by other sections of the Code, provides that actions against corporations upon contract may be brought in the county in which the contract was made. This is an action upon a contract, for a breach of the contract to carry the plaintiff as stipulated in the signed agreement, and as it was made in Anderson

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county the venue of the action was properly laid in that county. Appellant was one of the parties to the contract. It was made on its behalf by the Southern Railway Company in Kentucky, and when ratified by it and it undertook to carry it out it was executing the identical contract sued upon in this case. Therefore the Anderson circuit court had jurisdiction of the person of appellant by service of process.

Complaint is made that the verdict is excessive. The jury awarded appellee \$1,000. Under the facts shown we do not think it was so excessive as to indicate passion or prejudice on the part of the jury. We believe the evidence shows the conductor was mad, having just had some difficulty with other passengers on the same subject, and acted hastily, and without proper consideration or prudence. His conduct was unreasonable, overbearing, and despotic. He must have known that to put the passenger off the train at that time and under those circumstances was a serious matter, to him at least. He should have been sure of his case before acting so, and, in any event, he had no right to curse appellee, and otherwise treat him harshly in the presence of the passengers on the car.

On the whole case, we think the judgment should be affirmed.

LAKE SHORE & M. S. RY. CO. v. TEETERS.

(Supreme Court of Indiana, March 29, 1906.)

[77 N. E. Rep. 599.]

Carriers—Passengers—Injuries—Actions—Form—Variance.—Where a passenger traveling on a freight train in charge of stock was injured by the carrier's negligence, and sued in tort, proof that the transportation was had under a written contract did not constitute a fatal variance; responsibility therefor being imposed by law independent of the agreement.

Same—Exemption from Liability—What Law Governs.*—A passenger was injured in Indiana, while being transported on a freight train in charge of certain stock under an interstate contract made in New York. Such contract contained a provision purporting to release the carrier from all damages sustained by the passenger during the transportation, whether caused by the negligence of the carrier or any of its employees. Held that such provision, being contrary to the domestic policy of Indiana, would not be enforced in an action brought there for such injuries, though it was valid in New York.

Same—Drovers—Transportation on Stock Train—Passengers.†—A

*For the authorities in this series on the question whether the law of the place where the contract was entered into governs a contract of shipment purporting to limit the carrier's liability, see foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

†For the authorities in this series on the question, who are, and

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person transported on a freight train for the purpose of caring for certain stock while en route, the carrier being thereby relieved from such care, is a passenger for hire, as to whom the carrier cannot stipulate for exemption from responsibility for negligence of himself or his servants.

Same—Care Required—Negligence.—While a person traveling on a freight train in charge of stock assumes the risk and discomforts ordinarily incident to such mode of travel, the carrier is liable for injuries to him caused by the negligence of its servants, resulting in the wrecking of a portion of the train.

Same—Passengers—Transportation—Position in Train—Regulation.—A common carrier of passengers may require stockmen accompanying their stock to ride in caboose of train while in motion.

Same—Riding in Cattle Car—Notice.—Where a cattle transportation contract required plaintiff, who accompanied the stock, to load and unload, feed and water, and take care of the stock while being transported and exempted the carrier from any liability with reference thereto except in the actual transportation of the same, and there was neither rule nor provision requiring that plaintiff should ride in the caboose, but, on the contrary, during five days of the transportation before the accident in which plaintiff was injured he was permitted without objection to ride in the car with the cattle, the transportation contract of itself was sufficient to charge the carrier with notice that plaintiff was on its train at the time with his stock, and the failure to account for him in the caboose was sufficient to charge the carrier with notice that he was riding in the stock car.

Trial—General Verdict—Special Interrogatories—Inconsistency.—Answers to special interrogatories will not overthrow the general verdict, unless there is such an antagonism between the two on the material questions as to be beyond the possibility of being removed by any evidence legitimately admissible under the issues.

Damages—Personal Injuries—Evidence—Value of Services.—Where, in an action for personal injuries, plaintiff testified that he

are not, passengers, see *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

For the authorities in this series on the question whether a carrier of passengers can limit its liability, or exempt itself from liability, see foot-note appended to *Yazoo, etc., Co. v. Grant* (Miss.), 18 R. R. 257, 41 Am. & Eng. R. Cas., N. S., 257; *Sprigg's Adm'r v. Rutland R. Co.* (Vt.); 17 R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-note appended to *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603.

¶For the authorities in this series on the subject of the degree of care due a shipper accompanying live stock, see foot-note appended to *Chicago B. & Q. R. Co. v. Troyer* (Neb.), 9 R. R. 797, 32 Am. & Eng. R. Cas., N. S., 797.

For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers on freight trains, see foot-notes appended to *Rogers v. Choctaw, etc., R. Co.* (Ark.), 18 R. R. 592, 41 Am. & Eng. R. Cas., N. S., 592.

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was a teacher and civil engineer, he was entitled to testify concerning the reasonable worth of his services in the market as applied to such vocation.

Trial—Examination of Witnesses—Time for Objection.—The irresponsiveness of an answer to a question asked of a witness was not an objection that could be urged by a party who was not examining the witness, after the answer was fully completed.

Appeal—Right to Allege Error.—Where, in an action against a carrier for injuries to a passenger, plaintiff had testified to an arrangement whereby he was to receive about \$1,200 a year by teaching, and that he would have two or three months each year to devote to engineering in connection with the institution by which he was employed, and that he expected to receive from \$1,200 to \$1,500 a year, defendant's counsel having procured plaintiff's answer as to what he was to receive under the contract after he was injured to be stricken, defendant was not entitled to a reversal because of the admission of evidence as to what plaintiff could have earned.

Appeal from Circuit Court, Whitley County; Joseph W. Adair, Judge.

Action by Josiah C. Teeters against the Lake Shore & Michigan Southern Railway Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court (74 N. E. 1014), defendant appeals, under subdivision 3, § 1337j, Burns' Ann. St. 1901. Affirmed.

Olds & Doughman, for appellant.

H. W. Mountz and Marshall, McNagny & Clugston, for appellee.

GILLETT, C. J. Appellee brought this action to recover damages sustained by him, through the alleged negligence of appellant, while he was traveling in charge of stock. From a judgment in his favor the company appealed.

The evidence shows that Teeters, who was a professor in the Idaho Industrial Institute, entered into a contract with the New York Central & Hudson River Railway Company for the shipment, from Briarcliff Manor, N. Y., to Chicago, Ill., of three head of fine cattle, which he had obtained at a stock farm near Briarcliff Manor for the use of the institution with which he was connected. The stock was shipped in a stock car of the ordinary type, with slats along the sides. After the loading had been completed, the car was put into a train, and started west. Teeters had climbed into said car, and as it started he and the agent waived adieu to each other. The cattle were tied in one end of the car, and there was straw and feed therein for their use. The car was hauled over the line of the initial carrier to Buffalo, New York, at which point it was delivered to appellant, as a connecting carrier, for transportation to Chicago. As the freight train containing said car was passing through Burdick, in this state, said car and eight others were wrecked, and Teeters, who had made the journey in said car, was injured. The train was

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composed of 75 cars. The fortieth car from the locomotive was Teeters'. There were air brakes under 49 cars, and it was the last 9 of said cars that were wrecked. The accident was caused by a sharp check in the momentum of the air cars, owing to the shutting down of the brakes, thereby causing the cars that were not on the brake line, and which were, of course, strung out to the full extent of the slack under them, to come into collision with the other part of said train. It is not disputed that there was evidence from which the jury was warranted in concluding that the wreck was due to negligence upon the part of the engineer in the operation of the brakes. At the time of the accident Teeters had been nearly five days en route. He had taken supper in the caboose on one occasion, and he testified that it was his impression that it was while he was on the Lake Shore road, although he admitted that he was not certain as to this. His presence upon the train had been known to the brakemen of appellant. He had attended to the feeding and watering of his cattle, from time to time, as occasion demanded, and had furnished milk to the train crew of the train after leaving Buffalo. At Chatham, N. Y., he spoke to the yardmaster of the New York Central about securing a transfer to another car, as he had been wet by the rain. At Buffalo he asked the yardmaster of said road to have his car transferred, so that it might be taken on a Lake Shore freight which was scheduled to depart in a short time. There is no evidence that any of the crew that was in charge of the train after leaving Elkhart knew that Teeters was on board. When the car was delivered to appellant, it was transferred over a distance of seven or eight miles without a caboose, and at Brewster, N. Y., while the train was standing in the yards overnight, the caboose was taken away, and there was no caboose attached until the next morning. Aside from these instances, there was a caboose attached throughout the trip, a fact that Teeters had knowledge of. He was in the stock car at the time of the wreck, lying asleep in the hay and straw. He testified that the car was inspected at Buffalo; that he did not notice anything that would indicate that it was unsafe; that it rode very easily, and that he had never had anything to do with the operation or control of a freight train. He further testified that, under the transportation contract, it was his understanding that he was entitled to ride or go along as an attendant of the stock.

The contract of shipment was signed by the initial carrier and Teeters. He paid \$60 for the shipment. In substance, the contract is as follows: It recites the fact of the delivery of the stock of the carrier, and indicates its destination, and it further recites that the stock has been received by said carrier for itself, and upon behalf of connecting carriers for transportations upon the following terms and conditions, viz.: that said shipper is at his own sole risk and expense to take care of and to feed and water said stock whilst being transported, and to unload the same, and that neither of said carriers shall be under any liability or

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duty with reference to such matters, except in the actual transportation of the stock; that said shipper shall see that all doors and openings in said car are at all times so closed and fastened as to prevent escape therefrom of any of said stock, and that neither of said carriers shall be liable on account of the escape of said stock from said car; or for or on account of any injury sustained by said stock occasioned by any of the following causes, to wit, overloading, crowding one upon another, kicking, or goring, suffocating, fright, burning of hay or straw used for feeding or bedding, or by fire from any cause whatever, or from causes beyond the control of the carrier; "that whenever the person or persons accompanying said stock under this contract to take care of the same shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carriers nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract. And it is further agreed by said shipper, that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier, or its connecting carriers, without charge other than the sum paid or to be paid for the transportation of the live stock in charge of which he is, that the said shipper shall and will indemnify, and save harmless said carrier, and every connecting carrier, from all claims, liabilities and demands of every kind, nature, and description, by reason of personal injuries sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employees, or otherwise." Attached to said instrument and following the signatures thereto, is an instrument entitled, "Release for man or men in charge," which was signed by Teeters, and it purported "in consideration of the carriage of the undersigned upon a freight train" without charge other than the sum paid for the carriage of the live stock upon the train to release and discharge the carrier or carriers from all claims, liabilities, and demands for personal injury or damages sustained by such person, whether caused by the negligence of the carrier or carriers or of any of its or their employees.

The complaint does not set up the written contract. The action sounds in tort, and the accepting of the plaintiff as a passenger for hire is charged, in general terms, as matter of inducement. It is claimed by counsel for appellant that inasmuch as the evidence disclosed the execution of a written contract there was a fatal variance between the allegation and the proof. This precise question has but recently been determined adversely to the contention of appellant. *Pittsburgh, etc., R. Co. v. Higgs* (at this term) 76 N. E. 299. The duties which attach to a common car-

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rier in respect to the protection of the lives and limbs of its passengers for hire grow out of the relationship; they may have their foundation in contract, but the responsibility of the carrier in such cases is not measured by its agreement; it is imposed by law. *Railroad v. Lockwood*, 17 Wall. 357, 376, 21 L. Ed. 627; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Goddard's Outlines of Bailments*, § 323; *Pollock on Torts* (7th Ed.). 521. There can be no doubt as to the right in such a case to sue in tort. As was said by Bagly, J., in *Ansell v. Waterhouse*, 2 Chit. 1: "Declarations against carriers in tort are as old as the law, and continued until *Dale v. Hall*, 1 Wils. 281, when the practice of declaring in assumpsit succeeded. But this practice does not succeed the other. * * * This was only declaring as usual for 400 years before *Dale v. Hall*." There is no occasion entirely to wipe out the special contract in order to uphold a recovery under the pleadings; the company has been sued for a violation of its public duty, and the contract has nothing to do with the case except in so far as it may bear upon the question as to whether appellee was in a place where he was entitled to the protection of a passenger for hire.

What we have already said concerning the form of the action brings us naturally to the contention of appellant, raised in a variety of ways, that under the decision of the New York Court of Appeals, in *Poucher v. New York Central R. Co.*, 49 N. Y., 263, 10 Am. Rep. 364, the instrument purporting to be a release of damages was valid and effectual to release both the initial and the connecting carrier, and that therefore the courts of this state should hold that the agreement, being valid where made and where it was partially to be performed, was valid in this state. While it is the rule that any defense which is based upon the express terms of a contract is governed by the *lex loci contractus*, even though the action be *ex delicto*, yet the fact that the recognition of a provision for an exemption from liability for negligence would contravene the distinctive policy of the state in which the action arose and where the remedy is sought furnishes a sufficient reason for the refusal to recognize such provision. 2 Whart. *Conflict of Laws* (3d Ed.) § 471c. This state is concerned in the protection of the lives and limbs of all persons within its borders, whether interstate passengers or otherwise, and as respects responsibility for torts committed within the jurisdiction of its laws, its courts will, where necessary, assume to determine the common law for themselves, and will not permit parties to contravene the domestic policy of the state by invidious contracts for exemptions from liability for negligence. In a case comparatively recently decided by the Supreme Court of the United States, the question was involved as to the validity of a provision in a ticket of transportation from Belgium to the United States which purported to exempt generally the carrier from the consequences of his negligence. The ticket provided that it should be construed according

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to the laws of Belgium, and there was an offer to prove that the provision was valid where made. In passing on the questions as to the validity of the stipulation in this country, the court said: "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. * * * The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition, is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both of these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught." *The Kensington*, 183 U. S. 263, 268, 269, 22 Sup. Ct. 102, 46 L. Ed. 190. A well-known writer uses this language: "Public policy is less flexible and yielding where it comes to fixing the terms of human conveyance, than it appeared where only senseless goods and chattels were concerned; nor can it be affirmed as a general proposition, that the carrier of passengers may, by the most implicit understanding between the public transporter and his customer, be brought down even so slightly as to leave the former analogous, in legal responsibility, to an ordinary bailee for hire." Schouler, *Bailments, including Carriers*, § 564.

The law recognizes the fact that there is ordinarily little freedom of contract upon the part of the shipper in respect to a bill of lading, and it certainly will not support his agreement to waive his rights at law where the agreement is contrary to public policy. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Baltimore, etc., R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948. Cast into what form the agreement may be, the law assumes that the consideration for the carriage of a drover in charge of cattle lies in the service he renders in taking care of the animals or in the charge made against him or his employer for their transportation. *New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, and cases there cited. As was said in *Baltimore, etc., R. Co. v. Voight*, *supra*, a drover traveling on a pass, for the purpose of taking care of his stock on a train is a passenger for hire, and it is not lawful for a common carrier of such passengers to stipulate for exemption from responsibility for the negligence of himself or his servants. The case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, has

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been frequently followed, and it may be regarded as establishing a settled rule of policy. Many years ago this court held, in Ohio, etc., *R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719, following the forceful decision of *Railroad Co. v. Lockwood*, *supra*, that a drover in charge of cattle which were being shipped under contract was a passenger for hire, and that it was not competent for the carrier by contract to exempt itself from the consequences of its negligence in the transportation of such a passenger. These holdings have come to express rules of law in this state which are thoroughly established. Ohio, etc., *R. Co. v. Nickless*, 71 Ind. 271; Louisville, etc., *R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869. Assuming that appellee had so conducted himself as to be entitled to the protection of a passenger for hire, it must be said that in an action for a tort committed against him by the carrier in this state the courts will not hear the latter to assert that it had by contract abdicated the responsibilities which attached to it by virtue of its calling. Louisville, etc., *R. Co. v. Faylor*, *supra*.

There are some perils which are necessarily incident to traveling as a drover in a stock car, as dangers in getting on and off the car, and from such sudden jars as necessarily attend the operation of freight trains. These belong to the assumed risks of such travel. But it is to be remembered that neither gross nor ordinary negligence is known to the law pertaining to carriers of passengers for hire, and that any failure to bestow the care which the situation demands, resulting in the injury of such a passenger, whether he be a drover or no, is negligence. *Railroad Co. v. Lockwood*, *supra*; Ohio, etc., *R. Co. v. Selby*, *supra*. As was said by Osborn, C. J., in Indianapolis, etc., *R. Co. v. Beaver*, 41 Ind. 493, 498: "But whether the railroad undertakes to convey its passengers on a freight or passenger train, in caboose or well cushioned car, its duty is to so run and manage the train that passengers shall not, by its own carelessness, be killed or injured." It is clear, in view of the fact that the accident arose from the negligence of the engineer, as shown by appellee's evidence, and found by the general verdict and answers to interrogatories, that there is no question as to contributory negligence in the case if, at the time, appellee was in a place, where, as a passenger, he had a right to be. While the traveler assumes the discomforts and dangers which are inseparably incident to travel in a stock car, yet as against a negligent act in the management of the train, such as a wrecking of a portion of it through the negligent operation of the brakes, it cannot be said that the act of the traveler is in any wise contributory thereto. 4 Elliott on Railroads, § 1622. "A railroad may lawfully stipulate to carry a passenger in a baggage car, in an express car, in a stock car, or on a freight train generally." Chicago, etc., *R. Co. v. Lee*, 92 Fed. 318, 34 C. C. A. 365. In view of the rigorous obligations of a common carrier of passengers, the law accords to it the right to require stockmen to ride in the caboose while the train is in mo-

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tion. The right to enforce such a regulation finds a sufficient reason in the fact that it enables the carrier to concentrate its diligence in the protection of the caboose. The cases indicate the existence of such a requirement on some of the railroads, but appellant does not appear to have exercised this privilege.

Appellant's counsel cite many cases in which it has been held that passengers who voluntarily occupy places of increased hazard outside of those portions of the train intended for their carriage, and are injured as a result, cannot recover, and it is also contended that the very fact that a caboose is attached to a freight train is notice that the passenger is expected to travel in the car. If a passenger has no business upon other portions of the train, the rules of law suggested might be applied, but in view of the nature of a stockman's duties and responsibilities we doubt the application of such rules as to him. In the first place, the fact is to be borne in mind that the caboose has its own peculiar hazards. We find one case in which the railroad company had required the shipper to sign a bill of lading wherein he agreed to travel on the car containing the stock, and the company asserted as a defense to an action for his death that he was traveling in an emigrant car attached to the train. *Pennsylvania Railroad Co. v. McCloskey's Adm'r*, 23 Pa. 526. Looking at the matter from the view point of a man whose only relation with the railroad consists of a single shipment of stock, we venture to say that it would scarcely occur to him that his peril was augmented by riding in a freight car in the middle of a train, rather than in the caboose, or that he was in any sense a wrongdoer in riding in the car with the stock, the safe keeping of which the company had expressly devolved upon him. It was said in *Kansas, etc., R. Co. v. White*, 67 Fed. 481, 14 C. C. A. 483: "Stockmen charged with the duty of looking after their stock may do many things, on the freight train, without being guilty of negligence, which, if done by one riding in a passenger train, would undoubtedly constitute negligence." In *Chicago, etc., R. Co. v. Lee*, 92 Fed. 318, 34 C. C. A. 365, a recovery was upheld where the man in charge of a valuable mare was injured, while traveling in the car with the animal, owing to the derailing of the car. The contract provided that the car should be in sole charge of the shipper and his agent for the purpose of attention and protection to the animal and that the company assumed no responsibility for the safety of it, whether from theft, heat, jumping from car, or from injury which it might do to itself. In passing on the case, *Sanborn, J.*, said: "What was the meaning of the agreement of the parties in this case? Their contract must, like other agreements, be read and construed in the light of the circumstances surrounding them when they made it; and when it is considered that it was customary for the men in charge of fine animals to ride in the cars with them on this railroad; that the car in which the defendant in error was riding was furnished at Joliet for the transportation of the mare; that the company knew that the defendant

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in error was to go in charge of her; that he climbed into the car at Joliet, and rode there until he was injured; that the two conductors through whose charge he passed knew that he was riding in that car before the accident occurred, and made no objection; and that the written contract expressly provided that the car containing the animal was in his sole charge, for the purpose of attention to, and the protection of, the mare during the transportation, and that the company assumed no responsibility for her safety while in his charge, whether from theft, heat, jumping from the car, or injury, or damage, which she might do to herself—we are constrained to hold that the fair interpretation of this agreement is that it was a contract to carry the defendant in error in the stock car occupied by the mare from Joliet to Junction City upon his payment of fare from Rock Island to the latter place. If this was the contract, the defendant in error was guilty of no negligence in occupying that car rather than the caboose, because he had the right to rely upon the presumption that the company would use ordinary care to carry him safely in the car in which the contract permitted him to ride." We may also cite, as much in point on the question in hand; *Florida R. Co. v. Webster*, 25 Fla. 394, 5 South. 714, and *Fitchburg R. Co. v. Nichols*, 85 Fed. 945, 29 C. C. A. 500. The duty and privilege of the man in charge to exercise vigilance in caring for the stock was recognized in the latter case, which involved a contract of shipment precisely similar to the one involved in the case at bar.

Referring to the provisions of said contract, it appears that Teeters is referred to as the "man in charge," as the person "accompanying said stock to take care of the same"; that Teeters (designated as the shipper) was required by the contract not only to load and unload and feed and water the stock but "to take care of the same * * * whilst being transported"; that the company exempted itself from any liability or duty in reference thereto except in the actual transportation of the same"; that it specifically exempted itself from liability for the escape of any of said cattle, or for injuries sustained by "crowding one upon another, kicking, or goring, suffocating, fright, burning of hay or straw used for feeding or bedding, or by fire from any cause whatever." There is absolutely nothing in said contract which assumes to provide where the man in charge shall ride, but by the last clause of the bill of lading reference is made to a consideration based on the "carriage of a person or persons in charge of said stock upon a freight train." The only reference to the caboose is made in connection with stipulations designed to guard the carrier against responsibility for certain kinds of accidents which it is known as a matter of practical experience frequently befall drovers who travel in the caboose. For a reason to which we have already adverted, and because the bill of lading is the emanation of the carrier, it is clear that it is to be construed *contra proferentem*. An especially important circumstance in this

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case is the plain sanction which the agent, whom the initial carrier intrusted with the execution of the contract, gave to the act of appellee in riding upon the stock car. So far as concerns appellant, it must not be forgotten that the contract was a limited liability contract, made "on behalf of connecting carriers," and it is to be presumed that its terms were assented to by appellant, and formed the basis of carriage over its route. *Adams Express Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. Rep. 315; 4 *Elliott on Railroads*, § 1446. This contract, in and of itself, was sufficient to charge appellant with notice that appellee was upon its train in charge of the stock, and the failure to account for him in the caboose would plainly lead to the inference, in view of the duties and responsibilities resting upon appellee, that he was actually in charge of the stock. And especially is this true in view of the fact that in the transfer at Buffalo the car was hauled for a number of miles and delivered to appellant when there was no caboose attached. It is also difficult to resist the conclusion from the circumstances that those in charge of the train, and to whom notice would be equivalent to notice to the company, were actually apprised of his presence in the stock car. Upon the matter of the construction of the contract, there was nearly five days of acquiescence in the particular mode of construing it which appellee here contends for. In case of doubt such a construction is very influential with the courts. If appellant had knowledge of the manner in which appellee was traveling, it was immaterial that the crew which was engaged in the operation of the train after it left Elkhart did not have such knowledge. *Florida R. Co. v. Webster*, 25 Fla. 394, 5 South. 714. If they were not informed, they should have been.

Since appellee, by his contract, had absolved appellant from its common-law responsibility for the safety of the stock aside from the mere risk of transportation, it is clear, the stock being valuable, that he had a right, in the absence of any known requirement to the contrary, to be on hand at all times, to protect the property from those dangers which he had absolved the carrier from, and which, as a consequence, were risks which devolved upon him, and if he had a right to be present at all times to protect the property, he is not to be accounted a wrongdoer because, for convenience or otherwise, he elected to stay in a place that he had a right to be in. But, looking at the matter from the standpoint that the company had knowledge that appellee was in the stock car, we think the company's actions in permitting him to ride there day after day was equivalent to the act to assigning him to that place. This permission was tacit, and if the place was one of hidden peril, which made it improper to ride there, there was a duty, since he was a passenger and could not reasonably be expected to be apprised of dangers of collision as between different parts of a connected train, to warn him of the peril he was in. Note to 7 Am. St. Rep. 830. And see *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; *Chicago, etc.,*

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R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901. If it really could be said that there was any question as to appellee having been a passenger and the matter in any wise depended upon inferences that might be drawn from the evidence, the question was peculiarly one for the jury. Note to 61 Am. St. Rep. 103. We are quite within bounds in asserting that appellee was entitled to go to the jury on the question as to whether he was a passenger. Appellant was not entitled to judgment on the answers to interrogatories. As is well understood, such answers will not overthrow the general verdict unless there is such an antagonism between the two on material questions as to be beyond the possibility of being removed by any evidence legitimately admissible under the issues. *McCoy v. Kokomo, etc., R. Co.*, 158 Ind. 662, 64 N. E. 92.

But two questions remain for our consideration. They relate to rulings of the trial court in the admission of testimony given by appellee for the purpose of showing the extent of his pecuniary loss. The questions and answers which are objected to are as follows: Ques. "In the profession of life for which you have fitted yourself, and which was your calling and life work, you may state to the jury at the time of the accident what your services in said profession were fairly and reasonably worth in the market?" Ans. "From \$1,200 to \$1,800 per year." Ques. "Mr. Teeters, you may state, in the profession for which you have fitted yourself, and which was your life calling, at the time of the accident how much you could have earned." Ans. "I should say from \$1,200 to \$1,500 per year." Before discussing these rulings we may say that there was in evidence at that time the following facts: At the time of the accident appellee was 40 years old, and an unusually fine specimen of physical manhood. After graduating from the high school, he had six years at Oberlin and two years at Purdue. His vocation in life was that of a teacher, and his special lines of work were mathematics and civil engineering. He had had considerable experience as an engineer in the field. For three years and a half he was the principal of the Auburn, Indiana, High School, and for three years, extending up to within less than two months of his injury, he was a teacher of mathematics and superintendent of student labor at Berea college. He did considerable surveying while he was there, for the institution and for third persons. At the time of his injury, he had entered the employ of the Idaho Industrial Institute, to do the same general lines of work as he had at Berea. Upon entering his new employment he visited eastern cities, at the request of the president of said institution, for the purpose of raising money therefor, and he was returning from that errand when he was injured. It further appears that there was an arid farm of 1,160 acres in connection with said institution, which it was proposed to irrigate; that it was intended to utilize for that purpose a site for an irrigation dam, some 15 miles away, and that appellee was to do the civil engineering work in connection with the establishment of

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said dam and the building of the irrigation ditches. Immediately prior to the asking of the questions above set forth, appellee was asked this question: "You may state how much you could earn a year before you were injured?" He answered: "I received \$800 per year in addition to the amount of surveying I did; that would range from one to four hundred dollars per year. I was to receive about \$1,200, and all the money that I could make in civil engineering, there would be about two or three months of the year that I could take for that." It will be observed that appellee was answering as to how much he had been earning in the employment which had just terminated and as to the nature of his agreement concerning compensation in his subsisting employment. Appellant's counsel moved to strike out that part of the answer of the witness relative to what he was to receive under contract after he was injured, on the ground that the answer was not responsive, and upon the further ground that that was not the proper manner of proving damages. This motion was sustained. Appellant's counsel now assert that while it was competent for the appellee to state what his employment was, his fitness for such employment, and all the facts and circumstances which would tend to show his ability to earn money, it was not competent for him to give in evidence his opinion as to the market values of his services, or as to what he was able to earn.

Dealing first with the question as to the testimony as to the fair and reasonable worth of appellee's services in the market, we have to say that there can be absolutely no question as to the right to prove such a fact as applied to some distinct vocation in life, in which the person in question is specially skilled, and concerning which it may be presumed that there exists a demand at a salary or wage compensation. *Johnson v. Thompson*, 72 Ind. 167, 37 Am. Rep 152; *Bowen v. Bowen*, 74 Ind. 470; *Cleveland, etc., R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675; *Harmon v. Old Colony R. Co.*, 168 Mass. 377, 47 N. E. 100; *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5; *Baxter v. Chicago, etc., R. Co.*, 87 Iowa, 488, 54 N. W. 350; 7 Ency. of Evidence, 421, 424; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614; *International, etc., R. Co. v. Locke* (Tex. Civ. App.) 67 S. W. 1082. Most of the cases cited above are personal injury cases. *Harmon v. Old Colony R. Co.*, *supra*, is of that character, and in that case, Allen, J., speaking for the court, said: "If the plaintiff's services had a market value in the kind of business in which she was engaged, such market value might be proved to the jury as a fact which they might take into consideration, in determining the amount of damages." As to the remaining question, relative to the admission of testimony as to what appellee could have earned, we have concluded that the case should not be reversed for that reason. It will be observed from the structure of the question that it had to do with his power to earn money at the time of the accident, and therefore that it did not involve any problem of finding work in his vocation. In the next place, appellant had caused an

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answer (which we have set out above) to be excluded which was strongly calculated to elucidate that very question. The irresponsiveness of the answer was not an objection which could be urged by the defendant, since it was not examining the witness, after the answer was fully completed. The question at that stage was whether the evidence was competent. As to the other objection, we find that appellant's counsel are now, in effect, contending that this was the very class of evidence which was admissible on the subject of damages. It would seem, at the least, that appellants ought not now to be accorded any advantage because it procured a wrong ruling. *Spaulding v. Mott* (at this term) 76 N. E. 620; *Larey v. Baker*, 85 Ga., 687, 11 S. E. 800; *Insurance Co. v. O'Connell*, 34 Ill. App. 357; *Jobbins v. Gray*, 34 Ill. App. 208, 219. In the case last cited it was said: "Appellant cannot be allowed to procure an erroneous ruling in his favor and exclude competent and material evidence on the trial when it is offered and ready to be produced, and then on appeal to insist that, for want of that very proof, the decree cannot be sustained. A party will never be allowed to so take advantage of his own wrong, or the errors of the court induced on his own motion, and then compel the opposite party to suffer the consequences. Such a proceeding would be the merest trifling with the court." Without undertaking to say that the question in hand is fully within the principle laid down in the case last cited, it may be said that it is so far within the influence of that principle that we cannot shut our eyes to the fact that appellee had testified to an arrangement whereby he was to receive about \$1,200 a year by teaching, and that he would have two or three months in the year to devote to the work of engineering in connection with the institution. As to what he would have been able to earn in addition to \$1,200, it is to be noted that he does not fix upon any particular sum. "From \$1,200 to \$1,500 per year" is his answer, thus leaving the estimate of his earnings as a civil engineer ranging from nothing to \$300 a year. What that sum would have been was left to the jury, and if it found that he would have earned any sum in addition to the \$1,200, it must be that it fixed the sum, rather than the witness. In addition, it is to be considered that it appears that for the work done during the school year the man was commanding substantially \$100 a month; that he had testified that his services were worth in the market from \$1,200 to \$1,800 a year; that the jury so found in answer to an interrogatory, and that while in the same general employment at Berea, of teacher of mathematics, and superintendent of student labor, he had been able to earn from \$100 to \$400 a year in his work as a surveyor. All of these matters appeared without dispute, and it seems, therefore, that, with the engineering work existing for him to do, his estimate of from nothing to \$300 for such work was not open to question on the evidence. With every fact in the case in line with the reasonableness of his estimate, with a number of facts appearing which tended strongly

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to corroborate him, and considering the just expectation that the jury would have exercised a prevailing common sense in the application of the evidence concerning a class of services that we, as judges, know pertains to a highly skilled employment, there is certainly no reason to presume error from an answer that left it to the jury to fix the precise sum he would have been able to earn in such subsisting employment. Not only do these circumstances appeal to us as sufficient to prevent a reversal, but when it is considered that appellee's outside estimate as to what he could earn at the time of the accident was really nothing more in substance than testimony as to what would have been the value of his services (the matter being dependent on the problem, which he recognized, as to the extent that he would be able to employ his extra time), and that the validity of his conclusion, based as it was wholly on facts, could have been tested on cross-examination with even more readiness than ordinary testimony as to the value of services, it appears to us that the objection in the concrete involves a nonmeritorious technicality and nothing more. Of course, a ruling in the admission of testimony which in any way contravenes a rule of evidence is always a challenge to our consideration as to whether it affords a sufficient ground for a remanding of the cause for a new trial, but, presented as this point is, we feel that a reversal for the reason urged would evince the fact that this court had failed to exercise that practical judgment which is quite as essential in the disposal of a cause on appeal as it is at any other stage of a lawsuit.

Judgment of Whitley circuit court affirmed.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY *et al.*, Plffs. in
Err. v. JOHN A. MAYES.

(Argued and Submitted March 8, 1906. Decided April 2, 1906.)

[26 Sup. Ct. Rep. 491.]

Interstate Commerce—State Regulation—Carrier's Duty to Furnish Cars.*—When applied to interstate shipments, the provision of Tex. Rev. Stat. arts. 4497-4500, as amended by Acts 1899, p. 67, which penalizes the failure of a railway company to furnish cars to a shipper within a certain number of days after the latter's requisition in writing in the sum of \$25 per day for each car not so furnished, and admits of no excuse except as arises from "strikes" or other public calamity," is an unconstitutional regulation of interstate commerce.

In Error to the Court of Civil Appeals in and for the Third Supreme Judicial District of the State of Texas to review a judg-

*For the authorities in this series on the subject of state regulation of, or interference with interstate commerce, see foot-note appended to *United States' Exp. Co. v. State (Ind.)*, 18 R. R. R. 73, 41 Am. & Eng. R. Cas., N. S., 73; foot-note appended to *Illinois Cent. R. Co. v. Mississippi R. Comm'n (C. C. A.)*, 17 R. R. R. 544, 40 Am. & Eng. R. Cas., N. S., 544.

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ment which affirmed a judgment of the District Court of Llano County in that state, enforcing the statutory penalty for a carrier's failure to furnish cars to a shipper within the time limited after the latter's requisition in writing. Reversed and remanded for further proceedings.

See same case below, 36 Tex. Civ. App. 606, 83 S. W. 53; on rehearing, 36 Tex. Civ. App. 609, 83 S. W. 55.

Statement by Mr. Justice BROWN:

This was an action begun by Mayes in the district court of Llano county, Texas, against the Houston & Texas Central Railroad Company to recover a penalty of \$475, by reason of defendant's failure to furnish seventeen stock cars, applied for in writing by the plaintiff under the provisions of certain statutes of Texas hereinafter referred to, for the purpose of shipping plaintiff's cattle from Llano, Texas, to Red Rock, Oklahoma, and for damages occasioned by defendant's negligence.

The petitioner alleged that the defendant company formed with two other railroad companies a continuous line from Llano to Red Rock, and were engaged as common carriers in the business of shipping live stock and other freight; that on April 9, 1903, plaintiff, being the owner of six hundred and twenty-five head of cattle, made application in writing to the local agent of the road for seventeen stock cars, to be delivered on April 20, and deposited with the agent one fourth of the freight on the same, namely, \$268.82, promising to pay the remainder on demand, and that he afterwards paid the same; that upon the day named, April 20, he had cattle sufficient to load the cars, delivered them to the defendant at its stock pens at Llano for shipment, but the defendant failed to furnish the cars, and did not furnish the same until the afternoon of the 21st April, 1903.

The trial resulted in a judgment in favor of the plaintiff for \$425 penalty for delay, and \$500 damages to the stock while in the pens at Llano. This judgment was affirmed by the court of civil appeals, and an application for a writ of error to the supreme court of the state was overruled.

Messrs. Maxwell Evarts, James A. Baker, Robert S. Lovett, and Gordon M. Buck, for plaintiffs in error.

Messrs. T. W. Gregory and McLean & Spears for defendant in error.

Mr. Justice BROWN delivered the opinion of the court:

This case involves the constitutionality of certain articles of the Revised Statutes of Texas, set forth in the margin* the material

*"Art. 4497. When the owner, manager, or shipper of any freight of any kind shall make application in writing to any superintendent, agent, or person in charge of transportation, to any railway company, receiver, or trustee operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee, or other person in charge thereof to supply the number of cars so required, at the point indicated

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requirement of which is that when the shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and shall deposit one fourth of the freight with the agent of the company, the company failing to furnish them shall forfeit \$25 per day for each car failed to be furnished, the only proviso being that the law "shall not apply in cases of strikes or other public calamity."

The defense was that this statute was not applicable to demands made for cars to be sent out of the state and to be used in interstate commerce; and as the shipment was intended for Oklahoma, the act did not apply, and the defendant was not liable. The question is whether the statute, applied, as it is, by the Texas court, to interstate shipments, is an infringement upon the power of Congress to regulate interstate commerce.

That, notwithstanding the exclusive nature of this power, the states may, in the exercise of their police power, make reasonable

in the application, within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made, without giving preference to any person; provided, if the application be for ten cars or less, the same shall be furnished in three days; and provided further, that if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars. (As amended by the act of 1899, page 67.)

"Art. 4498. Said application shall state the number of cars desired, the place at which they are desired, and the time they are desired; provided, that the place designated shall be at some station or switch on the railroad.

"Art. 4499. When cars are applied for under the provisions of this chapter, if they are not furnished, the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of \$25 per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages such applicant may sustain.

"Art. 4500. Such applicant shall, at the time of applying for such car or cars, deposit with the agent of such company one fourth of the amount of the freight charge for the use of such cars, unless the said road shall agree to deliver said cars without such deposit. And such applicant shall, within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same, and upon failure to do so he shall forfeit and pay to the company the sum of \$25 for each car not used; provided, that where applications are made on several days, all of which are filed upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall notify the said company or its agent, he shall forfeit and pay to said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars." (As amended by the act of 1899, page 67.)

Act 4502 contains the following proviso: "That the provisions of this law shall not apply in cases of strikes or other public calamity."

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rules with regard to the methods of carrying on interstate business, the precautions that shall be used to avoid danger, the facilities for the comfort of passengers and the safety of freight carried, and, to ascertain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this court. Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the legislatures may annex such conditions as they please with regard to intrastate transportation, and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed.

The exact limit of lawful legislation upon this subject cannot, in the nature of things, be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether, in the particular case, the rule be reasonable or otherwise.

That states may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the state of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authorities is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employees, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. An analysis of all the prior important cases upon this point will be found in the opinion of the court in *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722, wherein a requirement that express trains intended only for through passengers should stop at every county seat, when ample accommodations were provided by local trains, was held to be an unreasonable burden. Other similar cases regulating the stoppage of trains are *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465. In the same line is the more recent case of *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except

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strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather.

A dereliction of the road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but, in addition thereto, by an arbitrary penalty of \$25 per car for each day of detention. The penalty which was assessed in this case, though the detention was only for one day, amounted to nearly as much as the damages, and might, in another case, amount to far more.

While perhaps the road may have no right to complain of that portion of the statute which assumes to provide for its own protection, it is illustrative of its general spirit that, if the shipper does not fully load his cars within forty-eight hours after their arrival, he shall forfeit \$25 for each car, or if the consignee shall fail to unload them within forty-eight hours after their delivery, at the place of consignment, which, in the case of interstate shipments, would be in another state, he shall also forfeit \$25 per day for each car unloaded.

In this connection the recent case of *Central R. Co. v. Murphy*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, is instructive. In that case we held that the imposition by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, or how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and an act of the legislature of Georgia imposing such a duty on common carriers was held void as to shipments made from points in Georgia to other states.

Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the state, and may have been intended merely to secure promptness on the part of the railroad companies in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional, and accidental violations of its provisions, when no damages could actually have resulted to the shippers.

It should be borne in mind that the act does not apply to cattle

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alone, but to all cases "when the owner, manager, or shipper of *any freight of any kind* shall make application in writing," etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of \$25 for each car, though the detention of the cotton involved no expense to the owner or may even have resulted in a benefit to him through a rise in the market.

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature.

The judgment of the Court of Civil Appeals is, therefore, reversed, and the cause remanded to that court for further proceedings.

MR. JUSTICE WHITE, not having heard the argument, took no part in the decision of this case.

The Chief Justice, MR. JUSTICE HARLAN, and MR. JUSTICE McKENNA dissented.

MacFEAT v. PHILADELPHIA, W. & B. R. Co.

(Superior Court of Delaware, New Castle, March 4, 1904.)

[62 Atl. Rep. 898.]

Death—Actions for Causing—Damages—Evidence.*—In an action against a carrier for wrongful death, a question asked a witness as to decedent's habits with respect to industry at the time of his death, with reference to decedent's earning capacity and to show that his life was of more value than that of a careless man, was too general.

Evidence—Expert Testimony.†—In an action against a carrier for wrongful death, a question asked a medical expert, who testified to the nature of the wounds on decedent's body, as to whether the injuries and the shock were such as would have been caused by being struck by an express train going at the rate of 25 or 30 miles an hour and his body being rolled or crushed under the running board of a shifting engine, was not a proper one for an expert to answer.

Same—Conclusion of Fact.—In an action against a carrier for wrongful death, a question asked a witness as to whether or not, in his judgment, the platform on which decedent was killed and the passageway or crossing over the same were an unusual and unsafe crossing for persons to use and wait upon for trains, was inadmissible as calling for a conclusion of facts.

Carriers—Injuries to Person at Station—Action—Evidence.—Where, in an action against a carrier for wrongful death, it appeared that, while plaintiff was waiting on defendant's platform for an approaching train, he was frightened by steam from a shifting engine coming up on a parallel track, causing him to jump in front of the approaching train, a question as to whether witness had seen the shifting engine and the cars attached at any other position than where they were at the time of the accident, on other days, when witness was waiting for the daily train for which decedent was waiting, asked for the purpose of showing a custom on defendant's part of standing a shifting engine and one or more cars in front of the station at the time of the approach of the passenger train to act as a fence to keep people back off the dangerous part of the platform, was inadmissible.

Same—City Ordinance—Speed of Trains.—Where, in an action against a carrier for causing the death of plaintiff's intestate while awaiting transportation at a station, plaintiff's declaration alleged that defendant's train which caused the accident was at the time moving

*See extensive note appended to *Tucker v. Boston & M. R. R.* (N. H.), 18 R. R. R. 294, 41 Am. & Eng. R. Cas., N. S., 294.

†For the authorities in this series on the question of the admissibility of expert and opinion testimony, see foot-notes appended to *Denver & R. G. R. Co. v. Scott* (Colo.), 17 R. R. R. 309, 40 Am. & Eng. R. Cas., N. S., 309; *Macon Ry. & Light Co. v. Mason* (Ga.), 17 R. R. R. 201, 40 Am. & Eng. R. Cas., N. S., 201; *Birmingham Ry. L. & P. Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; *German Ins. Co. v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

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at an unlawful rate of speed through the city, city ordinances in reference to the speed of trains passing through the city were admissible as against the objection that such ordinances were not identified and described with particularity in the pleadings.

Trial—Objections—Striking Out Testimony.—Where no objection to the reception of evidence is made, a motion to strike out the same must be made at or about the time the evidence is given.

Evidence—Photographs.†—In an action against a carrier for wrongful death, a photograph of the station at which decedent was killed, showing the situation of the tracks and station, was admissible.

Same—Expert Evidence.†—In an action against a carrier for wrongful death, evidence of a photographer as to where a camera was placed to take a photograph of defendant's track and the station where decedent was killed was inadmissible; the question not being one for expert testimony.

Carriers—Injuries to Person at Station—Question for Jury.—In an action against a carrier for causing the death of plaintiff's intestate while awaiting transportation at a station, evidence examined, and held sufficient to take the case to the jury.

Trial—Nonsuit—Judicial Discretion.—An exception does not lie to the court's ruling on a motion for a nonsuit; the question being one entirely within the discretion of the court.

Carriers—Injuries to Person at Station—Action—Evidence—Rebuttal.—Where, in an action against a carrier for wrongful death, plaintiff's witnesses testified that they saw one of defendant's witnesses standing on the railroad track two or three minutes before the accident, testimony of such witness as to where he was at or about the time of the accident was admissible in rebuttal.

Negligence—Proximate Cause of Injury.§—In an action for injuries resulting from negligence, defendant is liable only for such negligence as constituted the proximate or immediate cause of the injury.

Carriers—Injuries to Person at Station—Speed of Train—City Ordinance—Violation.||—The violation of a city ordinance respecting the rate of speed at which railroad trains may be run through the city is of itself an act of negligence, proof of which renders a railroad liable for any injury resulting therefrom to a person awaiting transportation at a station.

Same—Ordinary Care.||—The term "ordinary care," when applied to the management of railroad engines and cars in motion, imports all

†For the authorities in this series on the admissibility of photographs as evidence in negligent cases, see foot-notes appended to *Davis v. Seaboard Air Line Ry.* (N. C.), 18 R. R. R. 163, 41 Am. & Eng. R. Cas., N. S., 163.

§See monograph by Mr. Howe, 1 Am. & Eng. R. Cas., N. S., xix.

||For the authorities in this series on the question whether the violation of ordinances limiting the speed of trains or cars is negligence, see foot-notes appended to *Borneman v. Chicago, etc., Ry. Co.* (S. Dak.), 16 R. R. R. 464, 39 Am. & Eng. R. Cas., N. S., 464; foot-notes appended to *Clemans v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

||See generally, extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

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care which the peculiar circumstances of the place or occasion reasonably require, and this will be increased or diminished according as ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and management of such engines and cars.

Same—Warning by Bell or Whistle.—It is the duty of a railroad company to give timely and sufficient warning, by bell, whistle, or otherwise, of the approach of trains, and to run such trains at a rate of speed proper and reasonable under the circumstances.

Same—Care to Avoid Injury—Persons—Crossing Tracks.**—Persons crossing railroad tracks are bound to reasonably use all of their senses for the prevention of accident, and also to exercise all such reasonable caution as ordinarily prudent and careful persons would exercise in like circumstances.

Same.††—Common carriers of passengers are responsible for any negligence resulting in injury to the passengers, and are required, in the preparation, conduct, and management of their means of conveyance, to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances.

Same—Rights of Passenger at Station—Crossing Tracks.††—When the arrangement of a railroad station is such that a passenger has to cross the track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely, provided he crosses the same at a proper and reasonable time.

Same—Evidence—Presumptions. §§—In the absence of any evidence to the contrary, the law presumes that at the time of an accident

**For the authorities in this series on the question of the care required of a highway traveler to discover approaching trains before attempting to cross railroad tracks, see foot-note appended to *Greenwaldt v. Lake Shore, etc., Ry. Co. (Ind.)*, 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; *Rollins v. Chicago, M. & St. P. Ry. Co. (C. C. A.)*, 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; foot-notes appended to *St. Louis, etc., Ry. Co. v. Johnson (Ark.)*, 16 R. R. R. 775, 39 Am. & Eng. R. Cas., N. S., 775; foot-notes appended to *Louisville & N. R. Co. v. Bryant (Ala.)*, 14 R. R. R. 734, 37 Am. & Eng. R. Cas., N. S., 734.

††For the authorities in this series on the question of the care required of a carrier of passengers, see foot-notes appended to *Denham v. Washington Water Power Co. (Wash.)*, 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689; *Atchison, etc., Ry. Co. v. Holloway (Kan.)*, 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Blake v. Camden Interstate Ry. Co. (W. Va.)*, 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; *Little Rock Traction & Elec. Co. v. Kimbro (Ark.)*, 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; foot-notes appended to *Abbott v. Oregon R. Co. (Ore.)*, 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *South Covington & C. St. Ry. Co. v. Smith (Ky.)*, 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

††For the authorities in this series on the question whether a passenger has the right to assume that the duties owing to him have been performed, see foot-notes appended to *Chesapeake & O. Ry. v. Harris (Va.)*, 18 R. R. R. 139, 41 Am. & Eng. R. Cas., N. S., 139.

§§For the authorities in this series on the subject of the burden of proving contributory negligence, or its absence, see foot-notes appended to *Coolbroth v. Pennsylvania R. Co. (Pa.)*, 13 R. R. R. 419, 36 Am. & Eng. R. Cas., N. S., 419.

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occurring to a passenger at a railroad station through being struck by an approaching train, such passenger exercised reasonable care and caution to prevent injury.

Same—Contributory Negligence—Liability.|||—A railroad company is liable for injuries to a passenger if, notwithstanding any previous negligence of the latter, the company could have prevented the accident by the use of ordinary and reasonable care.

Same—Railroad Crossing.—One approaching a railroad crossing to take a train is bound to know that it is a place of danger.

Negligence—Actionable Injuries—Accident.||—A pure accident, without negligence on the part of the party responsible therefor, is not actionable.

Death—Action for Causing—Measure of Damages.***—In an action for wrongful death, the measure of damages is such sum as the jury believe from the evidence deceased would probably have earned in his business during life and have left as his estate at the time of his death, taking into consideration his age, his reasonable probabilities of life, his ability and disposition to labor, and his habits of living and expenditure.

|||For the authorities in this series on the question whether there may be a recovery on account of simple negligence where there was also contributory negligence, see foot-notes appended to *Feitl v. Chicago City Ry. Co.* (Ill.), 14 R. R. R. 798, 37 Am. & Eng. R. Cas., N. S., 798; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

For the authorities in this series on the subject of the combined effect of contributory negligence and negligence after the discovery of plaintiff's peril, see foot-notes appended to *Yeaton v. Boston & M. R. R.* (N. H.), 17 R. R. R. 160, 40 Am. & Eng. R. Cas., N. S., 160; *Rapp v. St. Louis Transit Co.* (Mo.), 16 R. R. R. 419, 39 Am. & Eng. R. Cas., N. S., 419; *McLean v. Omaha & C. B. Ry. & Bridge Co.* (Neb.), 16 R. R. R. 119, 39 Am. & Eng. R. Cas., N. S., 119.

|||See extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

***For the authorities in this series on the subject of the measure and elements of the damages recoverable in an action for wrongful death, see foot-notes appended to *Yeaton v. Boston & M. R. R.* (N. H.), 17 R. R. R. 160, 40 Am. & Eng. R. Cas., N. S., 160 (sufferings of deceased); foot-notes appended to *Birmingham Southern Ry. Co. v. Lintner* (Ala.), 16 R. R. R. 225, 39 Am. & Eng. R. Cas., N. S., 225; *Denver & R. G. R. Co. v. Gunning* (Colo.), 15 R. R. R. 842, 38 Am. & Eng. R. Cas., N. S., 842 (elements of the damages recoverable by husband or wife for death or injuries of the other); *St. Louis, etc., Ry. Co. v. Cleere* (Ark.), 17 R. R. R. 61, 40 Am. & Eng. R. Cas., N. S., 61 (excessive verdict); and right to interest on amount recovered from time of death; *Halverson v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 282, 36 Am. & Eng. R. Cas., 282 (excessive verdict); *Louisville & N. R. Co. v. Satterwhite* (Tenn.), 12 R. R. R. 296, 35 Am. & Eng. R. Cas., N. S., 296 (excessive verdict where evidence showed contributory negligence); *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307 (child incapable of earning money for his estate during minority); *Gregory v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 380, 34 Am. & Eng. R. Cas., N. S., 380 (loss of infant's services, common-law doctrine); *Cleveland, etc., Ry. Co. v. Miles* (Ind.), 11 R. R. R. 536, 34 Am. & Eng. R. Cas., N. S., 536 (loss of services of infant son); *Louisville & N. R. Co. v. Sullivan's Adm'r* (Ky.), 11 R. R. R. 131, 34 Am. & Eng. R. Cas., N. S., 131 (such sum as will

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Action on the case by Alexander L. MacFeat, administrator of Walter MacFeat, deceased, against the Philadelphia, Wilmington & Baltimore Railroad Company, to recover damages for the death of said deceased, which was alleged to have been caused by the negligence of said company on the 26th of June, 1902, at its French Street Station in the city of Wilmington. Judgment for defendant.

At the trial plaintiff proved: That on the 26th of June, 1902, Walter MacFeat was standing upon or crossing over the spur track of the defendant company nearly opposite and south from the waiting-room door of the defendant's French Street Station about the time the 1:37 p. m. Philadelphia express was due. That several others who were waiting for said train were also standing or moving about said tracks. That there was a cement pavement extending entirely around said station, 137 feet long and varying in width from 28 to 35 feet. That near the side track or spur on which MacFeat was standing, and to the south of it, was the south-bound track of the defendant company, and six feet further to the south of the latter track was the north-bound track of said company, all of which tracks were at grade and had boards between them, forming a crossing or passageway from the said station to certain of defendant's trains. That when the said express train was coming up to the station on the north-bound track, suddenly and without prior warning, a shifting engine of the de-

compensate estate for destruction of deceased's power to earn money); Louisville & N. R. Co. v. Logsdon's Adm'r (Ky.), 11 R. R. R. 756, 34 Am. & Eng. R. Cas., N. S., 756 (\$1200 not excessive verdict for killing three year old boy); Pennsylvania Co. v. Paul (C. C. A.), 10 R. R. R. 546, 33 Am. & Eng. R. Cas., N. S., 546 (measure); Chicago & E. I. R. Co. v. Beaver (Ill.), 6 R. R. R. 641, 29 Am. & Eng. R. Cas., N. S., 641; Western Md. R. Co. v. State (Md.), 6 R. R. R. 904, 29 Am. & Eng. R. Cas., N. S., 904 (elements); St. Louis, etc., R. Co. v. Robertson (Ark.), 7 R. R. R. 78, 30 Am. & Eng. R. Cas., N. S., 78; (elements of damages in action for death of father); Garbaccio v. Jersey City, etc., St. Ry. Co. (N. J.), 6 R. R. R. 666, 29 Am. & Eng. R. Cas., N. S., 666 (excessive verdict); Corbett v. Oregon Short Line R. Co. (Utah), 7 R. R. R. 736, 30 Am. & Eng. R. Cas., N. S., 736 (loss of services and society as elements of damages in action for death of child); Blauvelt v. Delaware, L. & W. R. Co. (Pa.), 9 R. R. R. 466, 32 Am. & Eng. R. Cas., N. S., 466 (pecuniary loss from death of son, in action by mother); Union Pac. R. Co. v. Roeser (Neb.), 8 R. R. R. 493, 31 Am. & Eng. R. Cas., N. S., 493 (pecuniary loss of next of kin); Neal v. Wilmington & N. C. Elec. Ry. Co. (Del.), 5 R. R. R. 386, 28 Am. & Eng. R. Cas., N. S., 386 (measure); Texas & P. Ry. Co. v. Harby (Tex.), 2 R. R. R. 602, 25 Am. & Eng. R. Cas., N. S., 602 (measure of damages for death of child); LeBlanc v. Sweet (La.), 2 R. R. R. 243, 25 Am. & Eng. R. Cas., N. S., 243 (measure of damages for death of daughter); Ft. Worth, etc., Ry. Co. v. Sivells (Tex.), 3 R. R. R. 927, 26 Am. & Eng. R. Cas., N. S., 927; Illinois Cent. R. Co. v. Clarkson (Tenn.), 5 R. R. R. 459, 28 Am. & Eng. R. Cas., N. S., 459 (measure of damages for death of husband and father); Voelker v. Chicago, M. & St. P. Ry. Co. (Iowa), 4 R. R. R. 509, 27 Am. & Eng. R. Cas., N. S., 509 (\$9,000 not excessive verdict for death of man twenty-nine years old earning \$75 a month); note, 10 Am. & Eng. R. Cas., N. S., 526 (expectation of pecuniary benefit as a cause of action); note, 5 Am. & Eng. R. Cas., N. S., 682 (funeral expenses); note, 5 Am. & Eng. R.

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defendant company, with two empty passenger cars attached, started west on said track on which MacFeat was standing and at the same time began to blow off steam. That MacFeat, apparently startled by the unexpected movement of the shifter, and in order to escape being run over by the same, moved away from said track, with his right side towards the north-bound track, on which the express train was then coming in at a very rapid rate (the testimony being that at the time of the accident the train was running from 25 to 30 miles an hour), and in so doing was struck in the hip or back by the projecting timbers of the cowcatcher of the engine of said express train, whereby he was hurled in front of and underneath the running board at the front of the moving shifter. That his body was rolled over a few times and crushed under said running board before the shifter came to a standstill. That by said striking by the engine and rolling under the running board of the shifter MacFeat was so badly injured that he died in about six hours thereafter. It was further proved: That the deceased was employed at the Kiamensi Woolen Mills, near Wilmington, but usually went to his home in Philadelphia on Saturdays to visit his family, and as a rule traveled over the Baltimore & Ohio Railroad, but sometimes used the defendant company's road. That on the Saturday in question he rode into town from Stanton with a witness named Guest, and told the latter that he was going home to Philadelphia from Wilmington on the train that left

Cas., N. S., 6 (reckoning the expectancies of deceased); note, 10 Am. & Eng. R. Cas., N. S., 557, 734 (elements of damages, in action for death of child); notes, 10 Am. & Eng. R. Cas., N. S., 542 (measure); note, 18 Am. & Eng. R. Cas., N. S., 46, 10 Am. & Eng. R. Cas., N. S., 533 (solatium for wounded feelings of relatives); note, 11 Am. & Eng. R. Cas., N. S., 750 (elements of recovery, in action for death of husband and parent); note, 13 Am. & Eng. R. Cas., N. S., 552 (exemplary and punitive damages); *Rudiger v. Chicago, St. P., M. & O. Ry. Co. (Wis.)*, 12 Am. & Eng. R. Cas., N. S., 197 (measure); *Missouri Pac. Ry. Co. v. Moffatt (Kan.)*, 12 Am. & Eng. R. Cas., N. S., 397 (basis for recovery); *Ft. Worth & D. C. Ry. Co. v. Hyatt (Tex.)*, 3 Am. & Eng. R. Cas., N. S., 397, *Goodrich v. Burlington C. R. & N. R. Co. (Iowa)*, 10 Am. & Eng. R. Cas., N. S., 719; *Louisville & N. R. Co. v. Creighton (Ky.)*, 15 Am. & Eng. R. Cas., N. S., 713 (measure of damages for death of child); *Walker v. McNeill (Wash.)*, 11 Am. & Eng. R. Cas., N. S., 738 (elements of recovery for death of husband and parent, and excessive verdict); *Denver & R. G. R. Co. v. Spencer (Colo.)*, 18 Am. & Eng. R. Cas., N. S., 236; *Fluhrer v. Lake Shore & M. S. Ry. Co. (Mich.)*, 18 Am. & Eng. R. Cas., N. S., 153; *Louisville & N. R. Co. v. Scott (Ky.)*, 17 Am. & Eng. R. Cas., N. S., 261 (excessive verdicts); *Southern Ry. Co. v. Covenia (Ga.)*, 10 Am. & Eng. R. Cas., N. S., 551 (funeral expenses); *Stuckey v. Atlantic Coast Line R. Co. (S. Car.)*, 20 Am. & Eng. R. Cas., N. S., 771 (grief of beneficiaries); *Malott v. Shiner (Ind.)*, 15 Am. & Eng. R. Cas., N. S., 774 (measure); *Thompson v. Great Northern Ry. Co. (Minn.)*, 19 Am. & Eng. R. Cas., N. S., 421 (\$7,000 not excessive); *Louisiana Western Ry. Co. v. Carsterns (Tex. Civ. App.)*, 12 Am. & Eng. R. Cas., N. S., 782 (measure); *Maghee v. McCarley (C. C. A.)*, 19 Am. & Eng. R. Cas., N. S., 216 (punitive damages recoverable under Alabama statute); *Chesapeake, etc., Ry. Co. v. Lang (Ky.)*, 6 Am. & Eng. R. Cas., N. S., 779; *Walker v. Lake Shore, etc., Ry. Co. (Mich.)*, 6 Am. & Eng. R. Cas., N. S., 779 (measure); *Green v. Southern Pac. Co. (Cal.)*, 13 Am. & Eng. R.

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there somewhere about 1 o'clock. That on arriving in Wilmington about 12 o'clock said witness stopped his team at Front and Madison streets and MacFeat got out and walked on down Front street towards the defendant company's station. Witness learned the following morning that MacFeat had been struck and killed by one of the defendant's trains.

The defendant produced evidence to the effect that MacFeat crossed the track in front of the shifter at a rapid rate and proceeded diagonally across the south-bound to the north-bound track, on which the express train was approaching, with his head down and his hands in his pockets, and never looked or stopped until he was struck by the said express train.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Levin F. Melson and Horace G. Knowles, for plaintiff.

Herbert H. Ward and Andrew C. Gray, for defendant.

During the course of the trial the following rulings were made as to the admission of testimony:

Alexander L. MacFeat, the plaintiff, was asked by Mr. Knowles the following questions:

Cas., N. S., 511; *May v. West Jersey & S. R. Co.* (N. J.), 13 Am. & Eng. R. Cas., N. S., 517 (elements); *Chicago & W. I. R. Co. v. Ptacek* (Ill.), 10 Am. & Eng. R. Cas., N. S., 481 (benefit accruing to adult children from decedent's life); *Felton v. Spire* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 865 (damages for benefit of decedent's children); *Tyler S. E. Ry. Co. v. Rosberry* (Tex.), 3 Am. & Eng. R. Cas., N. S., 376 (damages which a minor may recover for his father's death); *Green v. Southern Pac. Co.* (Cal.), 13 Am. & Eng. R. Cas., N. S., 511 (elements); *Oakes v. Maine Cent. R. Co.* (Me.), 22 Am. & Eng. R. Cas., N. S., 190 (earning capacity, under Me. St. 1891, ch. 124); *Garrick v. Florida Cent. & P. R. Co.* (S. Car.), 13 Am. & Eng. R. Cas., N. S., 541; *Nohrden v. Northeastern R. Co.* (S. Car.), 13 Am. & Eng. R. Cas., N. S., 557 (exemplary damages); *Boyden v. Fitchbury R. Co.* (Vt.), 10 Am. & Eng. R. Cas., N. S., 523 (expectation of pecuniary benefit of next of kin); *St. Louis & S. F. Ry. Co. v. Townsend* (Ark.), 22 Am. & Eng. R. Cas., N. S., 123 (loss of moral and intellectual training in action for death of father, in absence of evidence that he was a fit person to do such training; measure of damages), see also, *Louisville & N. R. Co. v. Clarke* (Ky.), 12 Am. & Eng. R. Cas., N. S., 408; *Louisville & N. R. Co. v. Creighton* (Ky.), 15 R. R. R. 713; *Louisville & N. R. Co. v. Kelly* (Ky.), 7 Am. & Eng. R. Cas., N. S., 165; *Louisville & N. R. Co. v. Taaffe* (Ky.), 15 Am. & Eng. R. Cas., N. S., 693; *Louisville & N. R. Co. v. Tucker* (Ky.), 23 Am. & Eng. R. Cas., N. S., 876; *Southern Ry. Co. v. Evans* (Ky.), 21 Am. & Eng. R. Cas., N. S., 809; *Walker v. Lake Shore, etc., Ry. Co.* (Mich.), 6 Am. & Eng. R. Cas., N. S., 779; *Louisville & N. R. Co. v. Jones* (Ala.), 23 Am. & Eng. R. Cas., N. S., 224 (measure of damages in action by administrator); *Denver & P. R. Co. v. Spencer* (Colo.), 10 Am. & Eng. R. Cas., N. S., 536 (Colorado rule as to measure of damages); *Louisville & N. R. Co. v. Creighton* (Ky.), 15 Am. & Eng. R. Cas., N. S., 713 (mental suffering of parents); *Cox v. Chicago & N. W. Ry. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 604 (nominal damages); *Chicago, P. & St. L. R. Co. v. Woolridge* (Ill.), 13 Am. & Eng. R. Cas., N. S., 501 (pecuniary injury); *Stahler v. Philadelphia & R. Ry. Co.* (Pa.), 21 Am. & Eng. R. Cas., N. S., 815 (right of adult children to recover damages for the negligent killing of their father, who made them a yearly allowance, not affected by fact that they inherited his estate).

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"Q. State as to your brother's habits, with respect to industry, at the time of his death. A. He was a very steady man, and never lost any time from his work, that I know of. Q. Was he or not a careful man? A. I would consider him to be very careful."

Mr. Gray: We object. That question has been ruled on in this court before. It is not whether he was an ordinarily careful man or not. The sole issue here is—if there is any issue as to his care—as to whether at the time of the accident he was in the exercise of due care.

Mr. Melson: The object of the question is to show that, if he was careful, his life was of more value than that of a careless man. I believe the court ruled it in the Cox Case.

PENNEWILL, J. You mean it has reference to his earning capacity?

Mr. Melson: Yes; reference to the loss.

PENNEWILL, J. We think it too general.

Mr. Ward: I move that the testimony on that point be stricken out.

PENNEWILL, J. Let the answer to that question be stricken out.

Dr. James A. Draper, who testified to the nature of the wounds upon the body of Walter MacFeat, was asked by Mr. Knowles the following question:

"Q. Were those injuries that he received, and the shock, such as would have been caused by being struck by an express train or the engine of it, going at the rate of 25 or 30 miles an hour and his body being rolled or crushed under a running-board of a shifting engine? (Objected to by counsel for defendant, as not a proper question for an expert to answer. Objection sustained.)"

John Sharp, a witness produced and duly sworn at the trial of the above stated case on behalf of the plaintiff, was asked by Mr. Knowles, among others, the following questions:

"Q. Are you familiar with the tracks and the crossing there [referring to the tracks and crossing at the French Street Station of the defendant company]? A. Yes, sir. Q. Right in front of the station? A. Yes, sir. Q. And have seen others passing over it to trains going backward and forward? A. Yes, sir; I have traveled over it every day for over a year. Q. Is that platform there and passageway or crossing, or not, in your judgment an unusually unsafe crossing for persons to use and to wait upon for the north-bound trains? (Objected to by Mr. Ward, of counsel for defendant, on the ground that it was calling for a conclusion of fact, which was for the jury to determine and not for the witness.)"

PENNEWILL, J. The majority of the court hold the question to be inadmissible.

"Q. In being down to take the 1:37 train, and other north-bound trains, have you seen the shifter and those waiting cars at any other position than where they were on that day? (Objected to by counsel for defendant as irrelevant. Counsel for plaintiff

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stated that they wished to show a custom on the part of the defendant company of standing the shifting engine and one or more cars in front of the station about the time of the approach of the 1:37 train, to act as a bar or as a fence to keep the people back off of the dangerous part of the platform where the tracks are; that it was proper to have the train there; that it was frequently seen there and did serve that purpose.)”

PENNEWILL, J. We think this question is inadmissible.

Mr. Knowles: We offer in evidence City Ordinances, p. 376, § 12, in reference to speed of trains passing through the city. (Objected to by Mr. Gray, of counsel for defendant, on the ground that, in order to introduce in evidence an ordinance of a municipality, said ordinance should be identified and described with particularity in the pleadings, whereas the allegation in plaintiff's declaration concerning the same was that the defendant's train which caused the accident was at the time moving at an unlawful rate of speed through the city, to wit, at a speed greater than six miles an hour. No authority was cited in support of the above contention.)

PENNEWILL, J. We think the ordinance is admissible if you have no other ground than that which you have stated.

Mr. Gray, of counsel for defendant, here states to the court that the witness Lewis Guest, called on behalf of the plaintiff at the afternoon session of the preceding day, had testified to certain statements made by Walter MacFeat on the morning of the accident to the latter concerning said MacFeat's intentions about going to Philadelphia on the afternoon train of that day; that such statements were obviously improper, and, although no objection was made to the testimony at the time, yet he considered that under the principles of evidence there could be no time limit, before the case was submitted to the jury, for a motion to strike out evidence, and therefore he made the motion that all such evidence as he had above referred to given by said witness should be stricken out.

PENNEWILL, J. You made no objection at the time to this evidence, and under our practice we think it is too late to make the motion now. Our practice is to require the motion to be made at or about the time the evidence is given. One reason for such a rule of practice, it occurs to us, is that, if at any time during the trial you could make such a motion, it would consume a great deal of time in going back and reading the testimony to ascertain what it was.

LORE, C. J. Another reason for our rule is that if you make no objection you waive your right and the testimony goes upon the record and becomes a part of it. The practice, as stated by Judge PENNEWILL, has been quite uniform in this court.

PENNEWILL, J. The court refuse your motion to strike out the testimony.

Harry Bucher, a witness, being produced, sworn, and examined on the part and behalf of the plaintiff, testifies as follows:

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By Mr. Knowles: "Q. Where do you reside and what is your occupation? A. At 902 West Eighth street, and I am a photographer. Q. At the request of counsel for plaintiff in this case, did you make a photograph of French Street station? A. I did. Q. Are you familiar with that locality? A. I am. Q. Have you been familiar with it for the last several years? A. Yes, sir. Q. What is the date of the photograph or negative which you made? A. The 14th of December, 1903. Q. Was the condition of the track and station there at that time the same as it had been for two years prior to that? A. To the best of my knowledge. Q. You have been familiar with it all of that time? A. Yes, sir. Q. You have been down there going to take the trains? A. Yes, sir. Q. Is that the photograph from the negative made at the time and place you just stated (shows photograph to witness)? A. This was made a week prior to that."

The above photographs are here offered in evidence by Mr. Knowles, objected to by Mr. Gray, who, pending the decision of the objection, cross-examines the witness as follows:

Cross-examination by Mr. Gray: "X. Where was your camera posted when you took that photograph—being the one showing the train? A. This one was made by a man in my employ. X. It was not made by you? A. No sir; the other was made by me. X. You don't know where that was taken from? A. This was made from the position of French street looking east. X. Do you new where the camera was posted? A. I imagine from this view, about the middle of the street. X. Was it taken with a camera? A. Yes, sir. What kind of a camera? A. I could not say. X. What paraphernalia was there? A. An ordinary focus camera. X. Is it such as you would use in your studio? A. No, sir; it is different, but it is a view camera. We use different focus lenses for outdoor and indoor work. X. You did not take that one yourself? A. Not that one; no, sir."

Mr. Gray: We object to the admission of the photograph, showing the train, as not being taken by this witness at all.

The witness: It was made under my supervision though.

"X. You were not present, though? A. No sir."

PENNEWILL, J. Do you offer both of them, or only one, Mr. Knowles?

Mr. Knowles: We will offer them separately. We will withdraw this one showing the train, for the present, and our offer covers the one now without the train.

Mr. Gray continues: "X. Who took this other one? A. I did. X. What time of day did you take it? A. I took that about half past 8 o'clock in the morning. X. Where was your camera posted there? A. I was standing at the southwest corner of Water and French streets."

Mr. Ward: We object to the admission of this photograph, the conditions not being the same as testified to in this case.

PENNEWILL, J. We think this is admissible. The objection is overruled.

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The same is marked by the stenographer "Plaintiff's Exhibit D."

Mr. Knowles: We now offer this other photograph in evidence—the one showing the train.

By Mr. Knowles: "Q. Who made that photograph? A. Mr. Wingfield, who is in my employ. Q. Was it made at your request? A. Yes, sir. Q. Is Mr. Wingfield an employee of yours? A. Not at the present time, but was at the time this was made. Q. Was the order for that photograph given to you at your place of business? A. It was. Q. And in accordance with that did you send your employee or representative out to take that photograph? A. I did. Q. Can you identify it as being a photograph of that particular place or station, the camera having been placed at or near the northeast corner of Water and French streets? (Objected to by counsel for defendant, and form of question changed as follows:) Q. You are an expert photographer? A. I am a photographer. Q. How long have you been engaged in that business? A. About 25 years."

Mr. Knowles here states that he desires to examine this witness, to see whether or not, as an expert, he can say where the camera was placed to take the picture or photograph, which he desired to offer in evidence.

PENNEWILL, J. We think this is not a question for expert testimony; and we hold that this picture is inadmissible at this time.

At the conclusion of plaintiff's evidence, counsel for defendant moved for a nonsuit, on the ground of contributory negligence on the part of the plaintiff. After said motion had been fully argued by the respective counsel, the court rendered the following opinion overruling the said motion:

PENNEWILL, J. Gentlemen, we have carefully considered the motion for a nonsuit made in this case, and while we have very grave doubt of the plaintiff's right to recover upon the evidence presented, we think the case should go to the jury. Therefore we decline to order the nonsuit.

Mr. Knowles: I ask to note an exception to the remarks of the court in refusing the nonsuit.

LORE, C. J. We do not think this is an exceptionable matter; the question as to a nonsuit being one entirely within the discretion of the court.

Mr. Knowles: May it please the court, I desire to note an exception to the ruling of the court upon my application for an exception to the remarks of the court in refusing the motion for a nonsuit.

LORE, C. J. Let it be noted that you asked leave to except, which was refused.

Frank Hyatt, a witness, being produced, sworn, and examined on the part and behalf of the defendant, testified, among other things, as follows:

By Mr. Gray: "Q. Do you remember the 26th day of May, 1902, the day this man MacFeat was killed? A. Yes, sir. Q.

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Where were you standing about half past 1 o'clock, or somewhere along there? A. I was standing at Front and the depot—Front and French—on the pavement of the station. Q. Did you see this man who was killed? A. Yes, sir. Q. Where did you first see him? A. The first I seen of him he ran into me. Q. He was running? A. Yes, sir; he was on a ziz-zag."

By Mr. Melson: "X. Where was this man, on Front street? A. Front and French. I was standing on the corner."

Mr. Melson: We object to the testimony as to what this man was doing at Front and French streets, or on any other street, or to what he was doing at any time or place other than the time and place of the accident.

Mr. Gray: Their witnesses have testified that they saw this man standing on the south-bound track two or three minutes before the accident. This is to meet that testimony.

PENNEWILL, J. We think it is admissible.

Plaintiff's Prayers.

First. If a person has the bona fide intention of taking passage by a train, and if he goes to a station at a reasonable time, he is entitled to protection as a passenger from the moment he enters upon the carriers' premises. Purchase of a ticket is not necessary to create the relation of passenger and carrier. *Grimes v. Pennsylvania Co.* (C. C.) 36 Fed. 72; *Gordon v. Grand St. & Newton R. R.*, 40 Barb. (N. Y.) 546; *Gordon v. West End Ry.*, 175 Mass. 181, 55 N. E. 990; *Jeffersonville, etc., R. R. v. Riley's Adm'x*, 39 Ind. 568; *Allender v. C. R. I. R. R.*, 37 Iowa, 264; *Inness v. Boston, etc., R. R.*, 168 Mass. 433, 47 N. E. 193; *B. & O. R. R. v. State to Use of Chambers*, 81 Md. 371, 32 Atl. 201.

Second. "The law in its beneficence will not allow any trifling with the lives or personal safety of human beings, and therefore exacts great care, diligence, and skill from those to whose charge as common carriers they are committed. * * * This obligation is imposed on them as a public duty and by contract to carry safely, as far as human care and foresight will reasonably admit." *Flinn v. P. W. & B. R. R.*, 1 Houst. 469, 500; approved in *Betts v. W. C. Ry.*, 3 Pennewill, 448, 53 Atl. 358; *McElroy and wife v. Nashua, etc., R. R.*, 4 Cush. (Mass.) 400, 50 Am. Dec. 794; *Indianapolis, etc., R. R. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Carroll v. Staten Island R. R.*, 58 N. Y. 126, 17 Am Rep. 221; *Watson v. St. Paul Ry.*, 42 Minn. 46, 43 N. W. 904; *Raymond v. Burlington, etc., R. R.*, 65 Iowa, 152, 21 N. W. 495; *Sherlock et al. v. Alling's Adm'r*, 44 Ind. 184; *Pittsburg, Cin., etc., R. R. v. Thompson*, 56 Ill. 138; *Hegeman v. R. R.*, 13 N. Y. 9, 64 Am. Dec. 517; *Coddington v. Brooklyn, etc., R. R.*, 102 N. Y. 66, 5 N. E. 797.

Third. "Carriers are affected by what are called 'legal duties' towards their customers. * * * And these duties of observance towards those employing the carriers, as they grow out of their occupation as public agents, do not require to be proved, on

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the trial of suits against them, but exist in legal contemplation, and therefore are recognized by the courts without any proof. Among the duties with which carriers are charged by law is that of providing a safe means of ingress and egress. * * * The law, indeed, would be sadly deficient, did it not require this duty at the hand of railroad carriers." *Wallace v. W. & N. R. R.*, 8 *Houst.* 529, 18 *Atl.* 818.

Fourth. "Where the arrangement of a station is such that a passenger has to cross a track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely, and the railway is liable if he be struck by train moving on that track when he is approaching or leaving the cars or station." *Terry v. Jewett*, 78 *N. Y.* 338; *Brassell v. N. Y. C. R. R. Co.*, 84 *N. Y.* 241; *Penn. R. R. v. White*, 83 *Pa.* 327; *Klein v. Jewett, Recv'r Erie Ry.*, 26 *N. J. Eq.* 474; *B. & O. R. R. v. State, to Use of Chambers*, 81 *Md.* 371, 32 *Atl.* 201; *Beecher v. L. I. Co.*, 161 *N. Y.* 222, 55 *N. E.* 899.

Fifth. Independent of any ordinance upon the subject, the running of its north-bound express train at a high rate of speed through a station where persons were waiting to take its trains would be evidence of negligence on the part of the defendant. *B. & O. R. R. v. State to Use of Chambers*, 81 *Md.* 384, 32 *Atl.* 201.

Sixth. "The plaintiff would be entitled to recover, notwithstanding there had been some negligence on the part of MacFeat, if it was the negligence of the defendant alone that was the proximate or immediate cause of the injury provided the negligence of MacFeat was not then continuing and did not at the precise time enter into the accident; in other words, if, notwithstanding the previous negligence of MacFeat, the company could have prevented the accident by the use of ordinary and reasonable care." *Cox v. W. C. Ry. Co.*, 4 *Pennewill*, 162, 53 *Atl.* 569; *Ford v. Warner Co.*, 1 *Marv.* 93, 37 *Atl.* 39; *Chielinsky v. Hoopes & Townsend Co.*, 1 *Marv.* 273, 40 *Atl.* 1127.

Seventh. "As MacFeat is dead, not here to speak for himself, the law clothes him with the presumption, that when using the platforms and passageways of the defendant at the French Street Station on that day, that he did his duty; used such care and precaution as an ordinarily prudent and careful man would use in like case, and by that presumption you are to be governed, unless the evidence, directly or indirectly, rebuts it and shows that he did not use such care and precaution." *Martin v. B. & P. R. R.*, 2 *Marv.* 130, 42 *Atl.* 442; *Cox v. W. C. Ry. Co.*, 4 *Pennewill*, 162, 53 *Atl.* 569.

Eighth. If, from the evidence, the jury believe that the defendant company started up its shifting engine and cars along and across the platform or that part of the station used and occupied by passengers while waiting for and boarding the north-bound trains, at or about the time the 1:37 train was coming in and up to the station, and that by reason of such action on the part of the defendant company, Walter MacFeat, in making an effort to

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escape from the danger of the approaching shifter, moved his position on the platform, and in doing so got so near the north-bound track that he was struck by the 1:37 north-bound train while running at a speed in excess of six miles an hour, and, either by the blow of the 1:37 train engine or by the shifting engine which partly ran over him, came to his death, then the defendant company is guilty of negligence, and the verdict of the jury should be for the plaintiff. *Cannon v. Pittsburg Trac. Co.*, 194 Pa. 159, 44 Atl. 1089; *Stevenson v. Chic., etc., R. (C. C.)* 18 Fed. 493; *Wilson v. N. Pac. R.*, 26 Minn. 278, 3 N. W. 333.

Ninth. The rule as to contributory negligence is that where the deceased even acts erroneously, if he so acts "through fright or excitement induced by the defendant's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened, he is not guilty of contributory negligence. And in considering the conduct of the deceased, if the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments; and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event." *Gannon v. N. Y., etc., R.*, 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833; *Penn. R. v. Kilgore*, 32 Pa. 292, 72 Am. Dec. 787; *Indianapolis R. v. Carr, Adm'r*, 35 Ind. 510; *Penn. R. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322; *Ward v. Chic. R.*, 85 Wis. 601, 55 N. W. 771; *Chicago v. Hesing, Adm'r*, 83 Ill. 204, 25 Am. Rep. 378; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *Schmidt v. Burlington R.*, 75 Iowa, 606, 39 N. W. 916; *Twomley v. C. Park. R.*, 69 N. Y. 158, 25 Am. Rep. 162; *Wilson v. N. Pac. R.*, 26 Minn. 278, 3 N. W. 333; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Buel v. N. Y. C. R.*, 31 N. Y. 314, 88 Am. Dec. 271; *Louisville R. v. Lucas (Ind. Sup.)* 21 N. E. 968, 6 L. R. A. 193.

Tenth. If the defendant "seeks to avoid liability for its negligence upon the ground of contributory negligence on the part of MacFeat, then the defendant must show such contributory negligence on the part of MacFeat by a preponderance of proof, or the plaintiff will be entitled to your verdict." *Louth v. Thompson*, 1 Pennewill, 156, 39 Atl. 1100; *Wilkins v. Wilmington*, 2 Marv. 132, 42 Atl. 418.

Eleventh. "If you should believe from the evidence in this case that at the time of the accident the north-bound train which struck MacFeat was running at a rate of speed in excess of six miles an hour in violation of the ordinance of the city of Wilmington, and that such excessive speed was the proximate cause of the injury to the plaintiff, then your verdict should be for the plaintiff. The violation of an ordinance of this city is of itself (per se, as we may say) an act of negligence which, in a legal controversy like this, only requires to be proved to render the wrongdoer liable for any injury resulting from such misconduct." *Knopf v. P. W. & B. R. R. Co.*, 2 Pennewill, 392, 46 Atl. 747;

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Robinson v. Simpson, 8 Houst. 400, 32 Atl. 287; Giles v. Diamond State Iron Co., 7 Houst. 453, 466, 8 Atl. 368; Diamond State Iron Co. v. Giles, 7 Houst. 566, 11 Atl. 189; Jones v. Belt, 8 Houst. 563, 564, 32 Atl. 723; Carswell, Adm'r, v. Mayor and Council of Wil., 2 Marv. 360, 365, 43 Atl. 169.

Twelfth. If you find for the plaintiff, "in estimating his damages, you may consider the reasonable probabilities of the life of the deceased and ascertain as nearly as you may the value of that life, including the past losses and such prospective damage as has resulted, or may result from his death." Carswell, Adm'r, v. City of Wilmington, 2 Marv. 360, 43 Atl. 169.

Defendant's Prayers.

The defendant prays the court to instruct the jury as follows: First. That the jury bring in a verdict for the defendant.

Second. That if the jury believe that Walter MacFeat negligently placed himself in a position of danger and was injured in consequence thereof, the said MacFeat was guilty of such contributory negligence as would prevent his recovery.

Third. That if the jury believe that Walter MacFeat negligently placed himself in a position of danger, and while in such position was confronted with an apparent imminent peril, and in attempting to escape such peril exposed himself to the injury by which he was killed, then the jury must find a verdict for the defendant.

Fourth. That if the jury find that the negligence of MacFeat contributed to and entered into the accident the jury shall return a verdict for the defendant, as MacFeat in that case would be guilty of contributory negligence. Where there is contributory negligence, the law will not attempt to measure the proportion of blame or negligence to be attributed to each party.

Fifth. If the jury find that any negligence, however slight, on the part of the plaintiff contributed to the accident, they must return a verdict for the defendant.

Sixth. If the jury should find that the defendant, at the time of the accident, was negligent by a violation of running its train at an unlawful speed, the defendant will not be liable if the injury was caused in any degree by the negligence or careless conduct of the plaintiff. The law does not permit any one to recover damages from another for an injury if his own negligence has contributed thereto, or where by the exercise of reasonable care he could have avoided it.

Seventh. If the jury believe that it has not been shown by the preponderance of the testimony that the negligence of the defendant was the proximate cause of the injury to the plaintiff, or if the jury should believe that the negligence of MacFeat himself contributed to the injury complained of, the jury should return a verdict for the defendant.

PENNEWILL, J. (charging the jury). This is an action brought by Alexander L. MacFeat, administrator of Walter MacFeat, deceased, against the Philadelphia, Wilmington & Baltimore Rail-

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road Company, to recover damages for the death of said deceased, which is alleged to have been caused by the negligence of said company on the 26th day of May, 1902, at its French Street Station in this city. The declaration filed in the case consists of numerous counts, but we think the negligence averred therein and relied upon by the plaintiff may be summarized as follows:

That the defendant did not provide or furnish sufficient, suitable, and safe platforms and passageways for the deceased at said station; that the defendant negligently and carelessly failed to properly warn the deceased of the movement of the cars operated and controlled by the defendant by guard, bell, whistle, or otherwise; that the defendant, knowing that deceased was caught and fastened by, under, and beneath its engine, did negligently move, start, and back said engine, thereby crushing and mangling the deceased; that by and through the negligence of the defendant its engine or car was driven or struck against the deceased without any notice or warning being given to him; that the defendant negligently furnished the deceased unsafe ingress to its trains, in that it failed to have the supply train in the proper and usual position, and by reason thereof an engine or car of the defendant was driven and struck against the deceased; that the defendant, knowing of the position of the deceased under its engine or shifter, negligently started, moved, and backed said engine or shifter, thereby wounding and injuring the deceased; that the defendant negligently ran and operated its engine, with the cars thereto attached, at the time and place of the accident, at a speed greater than it was authorized by law to do, to wit, at a speed upwards of six miles an hour.

It is also averred in said declaration that the defendant was negligent in causing one of its trains to approach said station without being stopped before reaching a passenger train that was receiving passengers, and also in failing to have its servants and employees standing at the proper place upon the said platforms and passageways of said station to give proper notice to the deceased of the movement of its trains. It is, however, admitted by the plaintiff that there is no evidence in the case to support either of these last two averments, and they are, therefore, not to be considered by you. In some of the counts of plaintiff's declaration it is alleged that the deceased was a passenger of the defendant company at the time and place of the accident, and in other counts it is alleged that he was on the platforms and passageways of the said company at the time of the accident lawfully or with the knowledge of the defendant.

The defendant company denies that it was guilty of any negligence that caused the death or injury of the said Walter MacFeat, and, moreover, insists that, if there was any negligence, it was the negligence of him, the said Walter MacFeat, and not the negligence of the company.

We have been asked by the defendant to direct you to find a verdict for the defendant. This we decline to do. We say to you,

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gentlemen, that with the facts or evidence in the case the court have nothing to do. They are for your determination alone. You are the sole judges of the effect and weight of the testimony. You have heard all the evidence, and it is now for your careful consideration and determination, applying thereto the law as we shall declare it to you.

This action is based upon negligence, which has often been defined by this court to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would use under similar circumstances. It is for you to determine from the evidence whether there was any negligence that caused the accident complained of, and, if there was, whether it was the negligence of the defendant or of Walter MacFeat, the plaintiff's intestate. To enable the plaintiff to recover at all, he must show to your satisfaction by a preponderance of the evidence, that the negligence which caused the accident, if any there was, was the fault of the defendant company. The burden of proving such negligence is upon the plaintiff, and the defendant can be held liable only for such negligence as constitutes the proximate or immediate cause of the injury.

There are certain things which amount to negligence in law, whether any positive or active negligence be proved or not. The violation of an ordinance of this city is of itself (*per se*, as we may say) an act of negligence, which only requires to be proved to render a wrongdoer liable for any injury resulting from such misconduct. In such case, however, the defendant would not be liable unless the violation of the ordinance—that is, the excessive speed of the train—caused the accident complained of; nor would the defendant be liable if the injury was caused by the negligence of the deceased. The law does not permit any one to recover damages from another for an injury if his own negligence has contributed thereto, or where by the exercise of reasonable care he could have avoided it.

The term "ordinary care," when applied to the management of railroad engines and cars in motion, imports all the care which the peculiar circumstances of the place of occasion reasonably require; and this will be increased or diminished according as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and management of such engine and cars. It is the duty of a railroad company to give timely and sufficient warning, by bell, whistle, or otherwise, of the approach of trains, and to run its trains at a rate of speed proper and reasonable under the circumstances; and, if the defendant failed to make use of such usual and appropriate means to warn the deceased at the time and place of the accident, it would be negligence on its part; and, if the accident occurred by reason of its failure so to do, the defendant would be liable, provided the deceased did not by his own negligence or want of care contribute to the accident. But, on the other hand, it is equally well settled that the person injured was also bound

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at the same time to use ordinary care to avoid the injury, and the care and diligence which he was bound to exercise must be in proportion to the danger to be avoided. It is a general rule that persons crossing railroad tracks are bound to the reasonable use of all their senses for the prevention of accident, and also to the exercise of all such reasonable caution as ordinarily prudent and careful persons would exercise in like circumstances.

As we have before stated, the plaintiff claims in certain counts of his declaration that the plaintiff's intestate, at the time and place of the accident, was a passenger of the defendant company; this, however, being denied by the defendant. It is for you to determine, from the evidence, whether he was such passenger or not. It is not necessary to constitute him a passenger that he should have had a ticket, or that he should have been actually upon the train of the defendant. If you believe that it was the bona fide intention of Walter MacFeat, at the time of the accident, to board the defendant's train, and that the defendant had knowledge of that fact, or that the acts and conduct of the deceased and the other facts and circumstances were such as to reasonably inform or notify the defendant that he intended to board the train, he was entitled to such care and protection on the part of the defendant as is required under the law where the relation of passenger and carrier exists. A common carrier of passengers is liable for injuries to the latter only in case of the carrier's negligence, and not when the passenger could have escaped the injury by the use of such care on his part as a reasonably careful person would take of himself under like circumstances. The law, however, exacts great care, diligence, and skill from those to whose charge as common carriers passengers are committed. Common carriers of passengers are responsible for any negligence resulting in injury to them, and are required, in the preparation, conduct, and management of their means of conveyance, to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract to carry safely, as far as human care and forethought will reasonably admit. *Flinn v. P. W. & B. R. R. Co.*, 1 *Houst.* 469; *Betts v. W. C. Ry. Co.*, 3 *Pennewill*, 448, 53 *Atl.* 358.

When the arrangement of a station is such that a passenger has to cross the track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely, provided he crosses the track at a proper and reasonable time and is not struck because of his own negligence. The tracks of a railroad company over which frequent trains are passing is a place of danger, and neither a passenger nor other person has a right to go upon them at an improper or unreasonable time. In the absence of any evidence to the contrary, the law presumes that at the time of the accident the deceased did his duty and did exercise reasonable care and caution. This, however, is merely a presumption of law, and may be rebutted by evidence showing

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that he did not exercise such care and caution. If the negligence of the deceased, Walter MacFeat, contributed to and entered into the accident at the time the injuries were received, the plaintiff cannot recover, even though the company was also guilty of negligence. In such case the deceased would be guilty of contributory negligence, and the law will not attempt to measure the proportion of blame or negligence to be attributed to each party.

The plaintiff, however, would be entitled to recover, notwithstanding there had been some negligence on the part of the deceased, if it was the negligence of the defendant alone that was the proximate or immediate cause of the accident, provided the negligence of the deceased was not then contributing to and did not at that precise time enter into, the accident; in other words, if, notwithstanding any previous negligence of the deceased, the company could have prevented the accident by the use of ordinary and reasonable care. The plaintiff's right to recover is based upon the negligence of the defendant. The burden is upon the plaintiff to prove such negligence to your satisfaction by a preponderance of the evidence; and, where contributory negligence is set up as a defense, it must be proved by the defendant in like manner.

While a person should not be held guilty of contributory negligence who, in the effort to avoid immediate danger, in the exigency of the moment, suddenly and without time or opportunity for reflection, puts himself in the way of other peril without fault on his part, and particularly so if the defendant has placed the person in such position, yet no one has a right to needlessly place himself in a place of danger; and if a person, failing to observe due care, walks into a danger that the observance of due care would have enabled him to avoid, he is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger, but fails to make any effort for his personal safety, and because thereof is injured. One approaching a railroad crossing is bound to know that it is a place of danger, and he must give that attention to the sights and sounds of warning of an approaching train, if any there are, that a man of ordinary caution, under like circumstances, would give.

A pure accident, without negligence on the part of the defendant, is not actionable; and if you believe that it was of such character, it would come under the head of unavoidable accident, and the plaintiff could not recover.

If you shall believe from a preponderance of the evidence in this case that at the time of the accident the train that struck the deceased was running at a rate of speed in excess of six miles an hour in violation of the ordinance of the city of Wilmington, and that such excessive speed was the proximate cause of the death of the deceased, and shall also believe that the deceased was free from any negligence on his part that contributed to the injury, your verdict should be for the plaintiff. But the plaintiff would not be entitled to recover, because of such excessive speed,

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if such excessive speed was not the proximate cause of his death.

Or if you should believe that at the time of the accident the defendant was not exercising ordinary care, as we have defined it to you—that is, all the care and circumspection, prudence, and discretion that an ordinarily prudent and careful man would have exercised under the circumstances—and that the want of such care and diligence was the proximate cause of the injury to the plaintiff, and shall also believe that the deceased was free from any negligence that contributed to the accident, then your verdict should be for the plaintiff. But if you should believe that it has not been shown by the preponderance of the testimony that the negligence of the defendant was the proximate cause of the death of Walter MacFeat, or if you should believe that the negligence of Walter MacFeat himself contributed to his death, your verdict should be for the defendant.

If you should find for the plaintiff, your verdict should be for such a sum as you believe from the evidence the deceased would probably have earned in his business during life and left as his estate at the time of his death, and which would have gone to his next of kin, taking into consideration his age, his reasonable probabilities of life, his ability and disposition to labor, and habits of living and expenditure.

Verdict for defendant.

ALLEN & GILBERT-RAMAKER CO. v. CANADIAN PAC. RY. CO.

(Supreme Court of Washington, Feb. 28, 1906.)

[84 Pac. Rep. 620.]

Carriers—Contract for Through Carriage—Injury to Goods—Liability of Contracting Carrier.*—A railroad company, which contracts to transfer goods to a point beyond its own line, is liable for injuries to the goods without regard to whether the injury occurs on its own line or that of a connecting carrier.

Same—Bill of Lading—Limitation of Liability.†—In a bill of lading, providing for the carrying of the goods beyond the line of the carrier issuing the bill, a provision in fine print, somewhat obscured by the use of stamps, that in case of injury to the goods only the carrier having custody of the goods at the time of the injury shall be liable, cannot be regarded as part of the contract.

*See foot-notes appended to *Southern Ry. Co. v. Levy* (Ala.), 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

†For the authorities in this series on the question whether the shipper's acceptance of a contract of shipment includes his assent to its printed conditions, see *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; foot-notes appended to *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88; foot-notes appended to *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 15 R. R. R. 744, 38 Am. & Eng. R. Cas., N. S., 744.

Allen & Gilbert-Ramaker Co. v. Can. Pac. Ry. Co

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by Allen & Gilbert-Ramaker Company against the Canadian Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Norwood W. Brockett and Thomas B. Hardin, for appellant.
Ballinger, Ronald & Battle, for respondent.

DUNBAR, J. The judgment appealed from is for \$500 and costs in favor of the plaintiff and against defendant, for damages to pianos shipped from New York to Seattle in the transportation of which defendant was an intermediate carrier. The car in which the pianos were shipped was delivered to, and accepted and sealed by, the New York, New Haven & Hartford Railroad Company, which issued and delivered to Ludwig & Co. its bill of lading. Ludwig & Co., the consignors, delivered the bill of lading of the New York, New Haven & Hartford Railroad Company to the agent of the defendant, the Canadian Pacific Railroad Company, and received a new bill of lading, or receipt from the defendant. The other intermediate companies were the New York Central & Hudson River Railroad Company and the Northern Pacific Railway Company. The end of the defendant's line was at Sumas in Washington. When the car reached there, it was turned over to the Northern Pacific Railway Company, which carried it to its destination at Seattle. The cause was tried by the court, a jury having been waived. The court, among other things, found, that the plaintiff had purchased from Ludwig & Co.'s manufactory in New York the pianos in question; that Ludwig & Co. had shipped them to the plaintiff at Seattle; that the New York, New Haven & Hartford Railroad Company issued to Ludwig & Co. a bill of lading for said pianos; that thereupon Ludwig & Co. delivered the original bill of lading to the duly authorized agent of the defendant in New York, who thereupon issued and delivered to said Ludwig & Co. a bill of lading upon which the goods were shipped; found that the goods were damaged in transit through the negligence of the defendant, and that the plaintiff was entitled to the judgment obtained. Exceptions were taken to the findings of fact, but an examination of the record convinces us that they were justified.

The only question which it is necessary to discuss in this case is a legal one, viz., what is the responsibility of the defendant company where goods were shipped under the circumstances under which these goods were shipped, the goods passing over the lines of different companies and being injured in transit? The court in this case found that it was not possible to determine on what particular line the damage occurred. We will consider the case as though the defendant here were the original company to which the goods were consigned, which it made itself, we think, by issuing the bill of lading or receipt, which stands for

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the contract between the shipper and the common carrier. Was the defendant responsible to the shippers for damages done to their goods beyond the termination of its own lines? It may be conceded, we think, that a carrier is under no common-law obligation to transport goods beyond its own line, and it may also be conceded that it cannot exempt itself from liability for its own negligence on its own line. The contention of the appellant here is twofold: (1) That the carrier did not assume to ship the goods beyond its own lines, and (2) that it did by express stipulation exempt itself from liability; while the contention of the respondent is that the case at bar is one where by special contract the defendant assumed the duty of transporting the pinanos from New York to Seattle, and that having done so, by mere provisions inserted in its receipt or bill of lading it cannot limit its common-law liability to a particular part of such through route; that when, by special contract, it undertakes to transport freight throughout the whole route to points beyond its own line, the law for the time being makes the whole line its line, and imposes upon it the duty of transporting its freight to its destination; that other connecting carriers for the purpose of that transportation become its agents, and that it cannot limit its common law liability to any particular portion or link of that through line.

On this subject of responsibility of transportation companies, there is a wilderness of conflicting authority, some courts holding that, in the absence of a special contract, it will not be presumed that the carrier attempts to deliver the goods beyond the terminus of its own line; others that the fact of the acceptance of the goods by the carrier and the issuance of a receipt or bill of lading implies a contract to safely deliver to destination mentioned in the bill of lading. This is the universal rule in England, and was laid down in the celebrated case of *Muschamp v. Lancaster, etc., Ry. Co.*, 8 Meeson & Welsby, 421, and has been adhered to uniformly by the English courts ever since. In that case a parcel was delivered at Lancaster, to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The Lancaster & Preston Junction Railway Company was known to be proprietor of the line only as far as Preston, where the railway united with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston, it was held that the Lancaster & Preston Railway Company was liable for its loss. In speaking of the instruction that had been made by the lower court, and which was the alleged error in the case, viz., that the jury might infer the contract to deliver at the end of the route, that the goods had been received and a receipt given therefor, Lord Abinger said: "I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggest, namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they

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should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. * * * Besides, the carriage money being in this case one undivided sum, rather supports the inference, that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners inter se as to the carriage money; a fact of which the owner of the goods could know nothing, as he only pays the one entire sum at the end of the journey. * * * It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind inter se, and should be taken each to have made the others their agents to carry forward."

It is asserted by the appellant in its reply brief that the cases cited by the respondent do not sustain the contention made by the respondent that, while the carrier owes no duty to the shipper to carry goods marked to a destination beyond its own line, yet when it does so undertake, it is prohibited by law from stipulating in its contract that it shall be liable only for its own negligence. An examination of these cases assures us, however, that while many of them are decided on the particular facts in the case, many of them do in principle sustain respondent's contention, and announce their adherence to the rule laid down in *Muschamp's Case*; and many more are cited by *Hutchinson on Carriers*, pp. 168, 169. So that it will not be necessary to reproduce them here. That author also states that, upon the question of the justice and policy of this rule, the American courts are divided; that a number of them have emphatically approved and adopted it, while in a majority of the states the rule has been denied. But it seems to us, as a matter of first impression, that the rule is a wise and equitable one and necessary for the protection of rights, without depriving the carrier of any rights or of any legitimate defense. If it should be held that the shipper could recover only against the carrier on whose line the damage was actually done, it can readily be seen that in many instances he would be deprived of his remedy altogether; for, as is found by the court in this case, in a majority of cases it would probably be impossible for him to establish the time at which the damage complained of was engendered. It would also be impracticable for him to make special contracts with all the different transportation lines. These companies enter into these traffic arrangements with each other for their mutual benefit, and may enter into them with agreements as to the protection of their separate interest by inspection, surveillance, or otherwise, while surveillance or care of the goods by the owner would be impossible.

Some of the difficulties besetting the contention of nonresponsibility are noticed by the Supreme Court of New Hampshire, in *Lock Company v. Railroad Company*, 48 N. H. 339, 2 Am. Rep. 242, where all the leading authorities are collated and reviewed.

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Among other things, it is said: "The use of steam in carrying goods and passengers has produced a great revolution in the whole business. The amount and importance of it have of late vastly increased and are every day increasing. The large business between different parts of the country is done, as in this case, by parties who are associated in long continuous lines, receiving one fare through and dividing it among themselves by mutual agreement. They act together for all practical purposes so far as their own interests are concerned as one united and joint association. In managing and controlling the business on their lines they have all the advantages that could be derived from a legal partnership. They make such an arrangement among themselves as they see fit for sharing the losses, as they do the profits that happen in any part of their route. If by their agreement each party to the connected line is to make good the losses that happen in his part of the route, the associated carriers, and not the owner of the goods, have the means of ascertaining where the losses have happened. And if this cannot be known, there is nothing unreasonable or inconvenient in their sharing the loss, as in case of a legal partnership, in proportion to their respective interests in the whole route. They undertake the business of common carriers, and must be understood to assume the legal liabilities of that business. They transact the business under a change of circumstances; but the principles and the general policy of the common law, which, as an elementary maxim, holds the common carrier liable for all accidental losses, must be applied to these new methods of transacting the same business; and there is certainly nothing in the present condition of the business which calls for any relaxation of the old rule. The great value of commodities transported over these connected lines; the increased risk of loss and damage from the immense distances over which they carry goods; the fact that where goods are once entrusted to carriers on these long routes they are placed beyond the control and supervision of the owner are cogent reasons for holding those who associate in these connected lines, to a rule that shall give effectual and convenient remedy to the owner, whose goods have been lost or damaged in any part of the line. Any rule which should have the effect to defeat or embarrass the owner's remedy, would be in direct conflict with the principles and whole policy of the common law." And much more to the same effect is said by this court. In fact, it seems to us that to deny this right to the shipper would be equivalent to a denial of justice at the hands of the law. The money is paid in one lump sum. The equitable distribution of this money is not within the province of the shipper. He has no way of ascertaining what the contract is between the different connecting lines in relation to their recompense or responsibility, and if his goods are lost or damaged he is relegated to a search across the continent to obtain information as to the responsibility of the different carriers for the damage, information which in many cases would be entirely unavailable. He has

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no way of accompanying the goods to look after them himself; probably would not be allowed to do so, under the transportation rules of the different companies, if he were so inclined. He deals with one company, which accepts his goods, receipts him for the same, and contracts to carry them to their destination; and any rule which would throw upon him the difficulties we have suggested would be unnecessary and inequitable.

It is contended, however, by the appellant that there is a special contract in this case, by which the defendant has exempted itself from liability; that by the bill of lading itself it is stipulated, "in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that the company alone shall be held answerable therefor in whose custody the same may be at the time of the happening of such loss, detriment, or damage." Even conceding, without deciding, that these conditions are reasonable and could be enforced if agreed to, they are in very fine type, almost impossible for any one not accustomed to them to read, and frequently, as in this case, made more illegible by the use of stamps which cover large parts of the printed matter; and without deciding whether or not the shipper, having made the other connecting shippers his agents in handling the goods which he started, would be bound by the action of such agents, and could not, therefore, escape the common-law liability which attaches to carriers, we think that this and similar expressions or announcements in bills of lading and receipts, etc., can in no wise be said to be contracts which bind parties to business transactions. Many of the cases, which take the view that carriers under circumstances of this case can exempt themselves from liability by contracts, hold that such statements made by the shipper do not constitute a contract; especially statements made on bills of lading that are frequently not handed to the shipper until the transaction is completed as far as he is concerned and the goods shipped. In laying down the text, on page 642, 6 Am. & Eng. Enc. Law (2d Ed.) the author says: "It is therefore of no effect where it is brought to the knowledge of the shipper after the goods have been shipped and it is too late for him to recede as where it is contained in a bill of lading handed to the shipper after the goods have left."

There is by some courts held to a distinction between the right of a carrier to exempt itself from liability beyond the line of its road absolutely, and the right to an exemption from its negligence. On page 643, Enc. supra, it is said: "Where the carrier undertakes, either expressly, or, as is the rule in some jurisdictions, impliedly by accepting the goods marked to a point beyond its line, to carry the goods over the entire route although the point of destination is beyond the terminus of its line, it is said that it cannot contract for an absolute exemption from liability for losses not occurring on its own line; that in such a case it can only limit its common-law liability as insurer, and remains liable

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for any loss caused by negligence, even on a connecting line." It would seem to us that there might be some reason in this distinction. Supporting this view is cited *Galveston, etc., R. Co. v. Allison*, 59 Tex. 193; *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500, and several cases from the Dominion of Canada.

On the whole case, we think no error was committed by the lower court, and the judgment is affirmed.

MOUNT, C. J. and ROOT, CROW, FULLERTON, and HADLEY, JJ., concur.

LOUISVILLE & N. R. Co. v. BROWN.

(Court of Appeals of Kentucky, Jan. 23, 1906.)

[90 S. W. Rep. 567.]

Evidence—Opinion of Witness—Competency.*—A liveryman, of 10 years' experience is competent to testify that a mare had fever and would not eat, or was sick; but he cannot give his opinion that the mare was suffering from lung fever.

Carriers—Injury to Stock—Evidence—Statement of Freight Agent—Admissibility.—Where, in an action against a carrier for injuries to a shipment of horses and for failure to deliver one of the animals, the carrier denied that the animal was not delivered, the statement of the carrier's chief freight agent, made in response to an inquiry by the shipper for the missing animal, that the horses had been caught in a death trap and that the animal had been killed, was admissible.

Appeal—Admission of Evidence—Harmless Error.—Where, in an action against a carrier for injuries to a shipment of horses, the evidence showed that the horses were seriously injured, any error in the admission in evidence of the statement of the chief freight agent that the horses had been in a death trap was harmless.

Carrier—Injury to Stock Shipment—Burden of Proof.†—Where, in an action against a carrier for injuries to a shipment of horses, the evidence showed that the horses were seriously injured, the burden of accounting for the injuries was on the carrier.

Same—Presumption of Negligence.†—Where, in an action against a

*For the authorities in this series on the subject of the admissibility of expert and opinion evidence, see foot-notes appended to *Denver & R. G. R. Co. v. Scott* (Colo.), 17 R. R. R. 309, 40 Am. & Eng. R. Cas., N. S., 309; *Birmingham Ry. L. & P. Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; *Macon Ry. & Light Co. v. Mason* (Ga.), 17 R. R. R. 201, 40 Am. & Eng. R. Cas., N. S., 201; *German Ins. Co. v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

†For the authorities in this series on the subject of the burden of proving whether or not the carrier is liable for loss of or injury to freight, see foot-notes appended to *Nashville, etc., Ry. Co. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88; foot-notes appended to *Peterson v. Chicago, etc., Ry. Co.* (S. Dak.), 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48.

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carrier for injuries to a shipment of horses, the evidence showed that the horses were seriously injured, negligence on the carrier's part was presumed.

Appeal from Circuit Court, Shelby County.
"Not to be officially reported."

Action by S. H. Brown against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Willis & Todd and *T. B. Harrison, Jr.*, for appellant.
P. J. Beard, for appellee.

HOBSON, C. J. S. H. Brown shipped 21 horses and 3 mules in a car from Shelbyville, Ky., over the Louisville & Nashville Railroad, consigned to himself at New Orleans, but to be stopped at Montgomery, Ala. When the horses reached Montgomery, Ala., they were unloaded. One mare was missing. She had died and had been taken out of the car at Birmingham, Ala. Another mare had her knees mashed and swollen almost as large as the crown of a hat. A bay horse had his hips mashed, one hip being knocked off. A brown horse was hurt inwardly. A bay horse had both hind legs skinned down to the ankles. A black mare and a bay horse were injured so that they died in two or three days. Another horse had his eye knocked out. The other horses in the car were all more or less injured. Brown sued for damages to his stock in the sum of \$600. On the trial he recovered a verdict and judgment for \$500, and the railroad company appeals.

The defendant introduced B. P. Wallace as a witness, who made among other things, this statement as to the brown mare that died and was not delivered: "My attention was directed to the brown mare by her failure to eat, and I examined her and found that she was suffering with what I would say lung fever. I examined her to see if she had been hurt by being down in the car, when I found that she had several degrees of fever." The circuit court excluded from the jury the statement: "I found that she was suffering with what I would say lung fever." Also the following words in another answer: "I found her to be sick. I pronounced it lung fever." The witness was a livery stable man at Decatur, Ala., and had been in the livery business 10 years. This qualified him to say that the mare had fever and would not eat, or was sick; but it did not qualify him to express the opinion that she was suffering from lung fever or from pneumonia. The court allowed the witness to say that the mare did not eat; that he examined her to see if she was hurt in any way, and found that she had several degrees of fever; but properly declined to allow him to give his opinion that the mare had lung fever, for the witness did not show that he was an expert in disease.

Appellant also complains that Brown was allowed to testify that its chief freight agent at Montgomery, Ala., said to him,

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when he went to inquire of his missing mare, as follows: "He told me my horses were caught in a death trap and that this mare was killed, and that he would try and pay me for her. He was looking for a claim in there for paying for hauling her off, and that he would try and pay me for her before I left there." The defendant denied that the mare had not been delivered, and this statement by its chief freight agent at Montgomery, Ala., when inquired of as to why the mare was not delivered, was competent against it in support of the allegations of the petition. If the proof for the plaintiff was true, his horses had been in a death trap, and whether the agent meant anything more than was suggested by the condition of the stock we need not determine; for, in view of the condition of the stock when delivered and the testimony offered by the defendant to account for their condition, we do not see that this evidence was prejudicial. The condition of the stock was such as to place upon the defendant the burden of accounting for it, and this it failed satisfactory to do. The condition of the stock was such as to raise a presumption of negligence on the part of the defendant, and the evidence introduced by it was insufficient to rebut this presumption. The damages awarded are not more than the evidence warranted. Under all the evidence, if the statement of the freight agent to Brown had been excluded by the court, it could have had no effect on the result.

Judgment affirmed.

SINGER v. MERCHANTS' DESPATCH TRANSP. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 15, 1906.)

[77 N. E. Rep. 882.]

Carriers—Receipt—Acceptance of Terms.*—A consignor, by accepting a receipt which provided for delivery without requiring the production of a receipt or bill of lading, accepted such provision as part of the contract.

Same—Misdelivery of Goods.—Where goods were consigned to L. S., Springfield, Ill., whether the consignor meant L. S., of Boston, Mass., or L. S., of Springfield, Ill., was not material.

Same—Knowledge of Previous Shipments.—A carrier's agent, who delivered goods to one whose name was the same as that of the consignee, was not chargeable with knowledge that the consignor had been sending goods through the same company for five years, six or seven times a year, addressed in the same way.

*For the authorities in this series on the question whether the shipper's mere acceptance of a contract of shipment includes his assent to its printed conditions, see foot-notes appended to *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88; *Patrick v. Missouri, etc., Ry. Co.* (Ind. Terr. App.), 16 R. R. R. 554, 39 Am. & Eng. R. Cas., N. S., 554; *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 13 R. R. R. 744, 38 Am. & Eng. R. Cas., N. S., 744.

Singer v. Merchants' Despatch Transp. Co

Exceptions from Superior Court, Suffolk County; Wm. Cushing Wait, Judge.

Action by L. Singer against the Merchants' Despatch Transportation Company. Verdict ordered for plaintiff, and defendant excepted. Exceptions sustained.

Josiah Bon, for plaintiff.

Woodward Hudson, for defendant.

LORING, J. The contract of the defendant in the case at bar was to deliver the cases in question to L. Singer, Springfield, Illinois, without requiring the production of a receipt or bill of lading.

By accepting the receipt, which states the conditions upon which the property is received, the plaintiff accepted those terms as part of the contract. *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660. The receipt in question states on its face that these conditions are to be found on the back. Such a receipt comes within that rule. See in this connection *Pemberton Co. v. New York Central Railroad*, 104 Mass. 144; *Doyle v. Fitchburg Railroad*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417. By force of this contract between the parties the case at bar is brought within the rule applied on proof of custom in *Forbes v. Boston & Lowell Railroad*, 133 Mass. 154.

The defendant performed this contract by delivering the goods to L. Singer, Springfield, Illinois.

Whether the consignor in the case at bar meant L. Singer of Boston, Massachusetts, or L. Singer of Springfield, Illinois, is not material. What a consignor in fact means if not communicated to the carrier is not material. The rights of the parties depend upon what is communicated to the carrier. *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. The carrier in making delivery is bound to follow that direction whatever it may mean under all the circumstances of the case.

It is agreed that the Lena Singer to whom the goods were delivered was, prior to and at the time in question, doing business in Springfield, Illinois, under the name of L. Singer, and was so known to the defendant's representatives in Springfield; also that she had been receiving goods over the defendant's line "nearly every week, addressed to L. Singer," and "that these cases were marked and billed in the same manner as other goods received at Springfield for said Lena Singer." It does not appear that there was any other L. Singer in Springfield.

Under these circumstances we see no ground for saying that the defendant did not follow the instructions given to him in delivering the goods to Lena Singer.

We cannot accede to the plaintiff's argument that because the defendant's agent in Boston had notice of the name of the consignor and consignee being the same he had notice that the goods

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were to be delivered to the consignor and therefore that L. Singer, Springfield, Illinois, meant L. Singer of Boston. If any inference ought to have been drawn from this fact we think it was that L. Singer of Springfield was the consignor acting through an agent in making the consignment.

Neither is it material that "the plaintiff had been doing business in Boston for eleven years, and had been sending goods to Springfield, Illinois, for five years prior to November 21, 1900, about six or seven times a year to the same Guaraluk, and had always sent his goods addressed in the same way, namely, L. Singer, Springfield, Ill., and through the defendant company, and he never had any trouble before this time." The defendant's agent in Springfield was not bound to remember and was not chargeable with knowledge of these facts. See in this connection *Raphael v. Bank of England*, 17 C. B. 161; *Vermilye v. Adams Express Co.*, 21 Wall. (U. S.) 138, 22 L. Ed. 609; *Seybel v. Nat. Bank of Commerce*, 54 N. Y. 288, 13 Am. Rep. 583, that prior notice of loss to a subsequent purchaser of a negotiable security does not charge him with knowledge of the facts stated in the notice. Whether this is the law in Massachusetts was left open in *Hinkley v. Union Pacific R. R.*, 129 Mass. 52, 59, 37 Am. Rep. 297.

The issues of negligence on the part of the plaintiff and on the part of the defendant, on which the judge below tried the case, were not the issues on which the rights of the parties in the case at bar depend. Where the instructions as to delivery are doubtful under the circumstances known to the carrier, he is put on his inquiry, and the question of negligence arises. But the instructions here were not doubtful under the circumstances known to the defendant. The judge in the court below apparently acted on *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. There was ground for arguing that instructions there were doubtful under the circumstances known to the carrier. It is to be observed that the charge to the jury in that case was held to have been "sufficiently favorable to the plaintiff," it was not held to have been correct.

The conclusion to which we have come is supported by *Dunbar v. Boston & Providence, R. R.*, 110 Mass. 26, 14 Am. Rep. 576; *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467; *M'Kean v. McIver*, L. R., 6 Ex. 36; *Stimson v. Jackson*, 58 N. H. 138; *Conley v. Canadian Pacific Ry.*, 32 Ont. 258; *The Drew* (D. C.) 15 Fed. 826; *Nebraska Meal Mills v. St. Louis Southwestern Ry.*, 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183.

The plaintiff evidently intended to pledge the goods shipped as collateral for his draft for the unpaid balance of the purchase money due him. To do that he should have had the goods billed to his own order and then indorsed the bill of lading to the bank discounting his draft. By mistake he billed the goods "straight" and is now seeking to make the defendant liable for his own blunder.

In the opinion of a majority of the court the entry must be:
Exceptions sustained.

YAZOO & M. V. R. Co. v. BLUM Co.

(Supreme Court of Mississippi, April 30, 1906.)

[40 So. Rep. 748.]

Carriers—Equipment—Duty to Furnish.*—Where, in an action against a carrier for failure to transport cotton with reasonable dispatch, defendant admitted that it had not provided equipment sufficient for the prompt handling during each recurring market season of the average cotton crop produced under normal conditions, a plea averring that during the market season of 1904-05, when the cotton in question was offered for shipment, there was an extra large crop and that the marketing of it created a demand for cars and facilities which could not have been foreseen, was immaterial.

Same—Defenses.*—Where a carrier accepted cotton for transportation and issued bills of lading therefor, it thereby assumed by operation of law the obligation to promptly transport and deliver the cotton, and could relieve itself for a failure to do so only by proof that it was prevented by an act of God, a public enemy, the act or conduct of the owner, or a special agreement limiting its duty.

Same.*—A carrier is legally bound to provide sufficient facilities for the reasonably prompt transportation of goods tendered for carriage, and is liable for a failure to transport promptly, whether the failure is due to a want of facilities or to a captious refusal to carry.

Appeal from Circuit Court, Washington County; A. McC. Kimbrough, Judge.

Action by the Blum Company against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The declaration avers that the plaintiff (appellee here) delivered during the months of October and November, 1904, to the defendant railroad company, certain bales of cotton for shipment from points on its line to Greenville, Miss., and that the defendant issued its bills of lading and receipts for said cotton, thereby agreeing and undertaking to deliver said cotton to the consignee within a reasonable time; that defendant failed to deliver said cotton to the consignee within a reasonable time; that by reason of this breach of duty the plaintiff sustained a loss on account of the decline in the price of cotton between the time it should have been delivered and the time it was delivered; and that by reason of this negligence on the part of the defendant railroad company the plaintiff was damaged, etc. To the declaration the defendant

*For the authorities in this series on the question, for what delays a carrier of freight is, and is not liable, see *St. Louis, etc., Ry. Co. v. Moss* (Ark.), 16 R. R. R. 66, 39 Am. & Eng. R. Cas., N. S., 66; footnotes appended to *Bibb Broom Corn Co. v. Atchison, etc., Ry. Co.* (Minn.), 14 R. R. R. 407, 37 Am. & Eng. R. Cas., N. S., 407.

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pleaded, first, not guilty; second, a special plea setting up, in substance, that it was provided with engines, cars, and other equipment necessary for handling freight over its lines during eight or nine months of the year, but that nearly all of its line of railroad ran through a cotton-growing country, and that during the marketing season of three or four months a year the rush of business required more cars and equipment than was necessary for the proper handling of the ordinary business of the company, and that the shipments of the cotton in question were offered during this rush of business, and that plaintiff's cotton was handled with all the dispatch and diligence possible under the circumstances; third, a special plea, the same as the preceding one, but averring also that the cotton crop for that season was unusually large, that it was impossible to handle it with ordinary dispatch, that it was impossible to foresee the unusual demands which would be made for the transportation of this large crop, that all the defendant's cars and equipments were used in transporting the crop, and that the delay was unavoidable. To these special pleas plaintiff demurred, setting up that these pleas constitute no defense, because, first, it is not alleged that plaintiff was informed or knew of the alleged lack of facilities at the time the cotton was tendered for shipment, nor that he assented to the delay; second, the defendant accepted the cotton for shipment, knowing its inability to ship within a reasonable time; third, the special pleas showed that the defendant knew of or could reasonably have anticipated the pressure of traffic during the time the cotton was delivered, and there is no allegation that any effort was made to provide therefor. The court sustained the demurrer, the defendant withdrew its plea to the general issue, declined to plead further, and a judgment was entered for an amount agreed upon by the attorneys to be due, if any liability rested up the defendant; and from this judgment this appeal is prosecuted.

Mayes & Longstreet, for appellant.

Shields & Boddie, for appellee.

TRULY, J. There are several reasons why the demurrer to the special pleas of the appellant was properly sustained. The pleas admit that the delay in the handling and transportation of the appellee's cotton and the damage sustained "resulted from defendant not being provided with sufficient equipment and facilities for the handling of this cotton with greater expedition than was used in handling it." It is also manifest from the allegations of the special pleas that the appellant does not possess the engines, cars, and other equipment necessary for the handling of freight over its line, ample and sufficient for the transportation with promptness and dispatch of all business ordinarily offering at all times." On the contrary, it is not even contended that the railroad company has the necessary equipment for promptly handling and transporting the cotton and other freight delivered to it during the busy season. The appellant admits that during the

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marketing season, when enormous quantities of cotton are sought to be rushed to market, it creates a great pressure of business over the line, so that its equipment is totally insufficient for the handling of the business with expedition and dispatch. It is true that appellant in its special plea does aver that during the season of 1904 and 1905, when an extra large cotton crop was grown, the "marketing of it created a demand for cars and depot and terminal facilities which could not have been foreseen, anticipated, or provided for." But this statement of a conclusion cannot avail, in view of the admission that the railroad company was not provided with an equipment sufficient for the prompt handling and transportation of the business annually delivered to it during each recurring, marketing season of the average cotton crop, produced each year under normal conditions.

In the Ragsdale Case, 46 Miss. 478, the general rule is thus stated: "If the company have a reasonable equipment for all ordinary purposes, and the delay be occasioned by an unusual press of business, but the carrying is done with reasonable expedition under the circumstances, then it is not responsible for the delay." We are not disposed to question the accuracy of the general observation just quoted, though, of course, it is subject to several modifications, as even a casual analysis will demonstrate. But the rule quoted, even if absolutely accurate, is not controlling in the instant case, for the reason that the facts disclosed by the special pleas show that the company does not possess "a reasonable equipment for all ordinary purposes." It plainly appearing that the business of the appellant railroad company is confined in a large degree to the handling of cotton, and that it is known in advance there will be this annual press of business during the marketing season, it is not averred or intimated that any effort has been made to provide adequate facilities and equipment for proper handling and transportation of a normal and expected crop. Here is a condition of affairs known, foreseen, and expected, of annual recurrence, and yet no effort made to provide for the emergencies which inevitably arise with the occasion. The true rule applicable here is stated in the Ragsdale Case referred to as follows: "When property is delivered to a carrier, the law implies a contract that it shall be safely and within a reasonable time carried to and delivered, at the place of destination. Nothing relieves from the obligation to deliver, except the act of God, the public enemy, the act or conduct of the owner, or a special agreement limiting the common-law duty, if the time is not named. The implication arises, from the receipt of the property for transportation, that it shall be done with due dispatch or within a reasonable time." Gauged by this enunciation of the rule the liability of the appellant is plain.

But, if it were conceded that the production of an extra large crop was "an unusual press of business," within the meaning of that expression, and that it constituted an unforeseen emergency, though it manifestly appears that the carrier was not equipped

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with sufficient appliances and facilities to promptly handle any crop which might be produced, still that defense would not be available to the appellant in this case, for this reason: It appears from the averments in the pleadings that the appellant accepted the cotton for transportation and issued its bills of lading therefor. Thereby it assumed by operation of law the obligation to promptly transport and deliver, and from this legal operation nothing can relieve the carrier, except "the act of God, the public enemy, the act or conduct of the owner, or a special agreement limiting its duty." None of these relieving causes intervened, and it does not appear that anything happened to change the condition of affairs which existed at the date of the acceptance of the cotton for prompt transportation and delivery. The delay was not caused by any unusual press of business subsequently arising or which could not be foreseen, for the same conditions obtained afterward as at the time of the acceptance of the freight. Knowing the difficulty of transportation, being informed of a then existing press of business, aware of the probability of an inability to promptly handle and transport freight, a carrier cannot accept and receipt for freight for transportation, and then plead in excuse and extenuation of its delay a condition of affairs of which it was at the time advised. This consideration prevents the appellant denying liability for delay in transportation. It is this potent fact which plainly distinguishes the instant case from the Ragsdale Case relied on. In the Ragsdale Case the delivery was prevented by a sudden and disastrous condition of ferries and floods, against which the carrier was powerless to protect itself. In that case, also, the shipper was advised, at the time of the acceptance of the freight, of the difficulties attending the shipment and the delay which would probably ensue; and yet in that case it is worthy of observation that this court did not hold, even under the special circumstances set out, that the carrier was not liable for damages for the delay in forwarding the freight. At the time when this cotton was delivered to the carrier for transportation the annual press of business which it confessedly was unable to promptly handle, and for the transportation of which it had taken no steps to properly equip itself, was then confronting it. The carrier was aware at the time of the tender of the freight of the probability of delay in handling the shipment, but notwithstanding this, it accepted the cotton, issued its bills of lading, and thereby assumed its legal liability for damages for failure or delay in transportation and delivery. It did not advise the shipper of the probability of delay, and thus afforded him no opportunity of selecting some other method, if one might be had, of transporting his freight or of disposing of it at the place of shipment. Under such circumstances to hold that the carrier was not liable for the damages admittedly caused by the delay in transporting the freight would be tantamount to saying that shippers of this country are remediless at the hands of the court and rest absolutely at the mercy of the carriers.

If it can be said that the carrier, which only has necessary equipment to handle its ordinary business for eight or nine months of the year, when business is dull and limited, has complied with the law, why may not the same excuse be pleaded by the carrier which has necessary equipment to handle its business only in the dullest single month of the year? And thus the law which imposes liability upon the carrier for failure to promptly handle and deliver freight consigned to its care becomes absolutely ineffective. Many privileges are granted the common carriers of this state by the law; but certain reciprocal obligations are imposed, and amongst those no duty is more important to the commercial world at large than that which requires the prompt transportation of freight and which imposes liability for any failure in that regard. The true rule in this matter, in our opinion, and we quote it for the purpose of approving it, is found in 5 Am. & Eng. Ency. of Law, pp. 160, 167, 169, 256, as follows: "The duty of carriers embraces, not only the duty to transport goods accepted by them, but to do so promptly and within a reasonable time. If there is any unreasonable delay, the carrier remains liable as insurer for the safety of the goods, and is also responsible for whatever damage may result to the shipper as a proximate consequence of the delay. But in the case of railroad and similar companies, endowed with special and unusual powers, with express view to their rendering to the public a freight and passenger service adequate to the needs of the country through which their lines pass, the law imposes the obligation to have and to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage, and they are liable for a failure to transport promptly, whether the failure is due to a want of facilities or to a capitious refusal to carry. If it accepts goods after knowledge of its inability to transport them it is liable notwithstanding, unless the shipper consented to the delay. Where it appears that the carrier has reasonable facilities for the transportation of goods under ordinary conditions of business, and furnishes them all for the use of shippers, the fact of an unusual and unexpected press of business will excuse a delay in transportation, provided the shipper is informed of the fact at the time of shipment or as soon thereafter as it is known. But such a fact constitutes no excuse when the carrier, with full knowledge of it, accepts goods for transportation without informing the shipper, or where it appears that the carrier was derelict in his duty to have and provide proper facilities for transportation." Tested by the rules thus announced, which are consonant with justice and absolutely necessary for the protection of the commercial world, it plainly appears that the appellant in this case was liable for the damages caused by its delay in transporting the cotton delivered to it.

Inasmuch as the amount of recovery is agreed upon in the event the carrier's liability be established, the judgment is affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err., v. MUGG & DRYDEN*, a Partnership Composed of J. A. Mugg and J. A. Dryden.

(Submitted April 18, 1906. Decided May 14, 1906.)

[26 Sup. Ct. Rep. 628.]

Interstate Commerce—Right to Charge Rates Scheduled with Interstate Commerce Commission.—A common carrier may exact the regular rate for an interstate shipment, as shown by its printed and published schedules on file with the Interstate Commerce Commission and posted in the stations of such carrier, as required by the interstate commerce act, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted.

In error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the County Court of Tarrant County, in that state, in favor of plaintiffs in an action against a common carrier, founded on the exaction by the carrier of the rate for interstate shipments scheduled with the Interstate Commerce Commission, after having quoted a lower rate to the shippers, under which the shipment was made. Reversed and remanded for further proceedings.

See same case below, 98 Tex. 352, 83 S. W. 800.

Statement by Mr. Justice WHITE:

The railroad company, plaintiff in error in this record, appealed to the court of civil appeals of the second supreme judicial district of the state of Texas from a judgment which had been rendered in favor of Mugg & Dryden, defendants in error herein. The appellate court certified to the supreme court of Texas the question of the liability of the railroad company, upon a statement of facts which correctly set forth the controversy, and which was as follows:

"The cause originated in the justice court, from which it was appealed to the county court of Tarrant county, where a trial was had on the following statement of appellees' cause of action, to wit: 'Statement of plaintiff's cause of action. Damages in the sum of \$140.18, as follows: By reason of defendant making and quoting to plaintiffs a rate of \$1.25 per ton on two cars of coal and \$1.50 per ton on one car of coal, in January and February, 1903, respectively, from Coal Hill, Arkansas, to Weatherford, Texas, on which rates so made and quoted plaintiff relied in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiff freight at the rate of \$2.75 per ton on said two cars, and \$2.85 on said one car, which said freight rate plaintiff was forced to pay and did pay under protest in order to obtain said coal and deliver the same in compliance with sales previously made. That plain-

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tiffs' loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiff the said rates, on which rate quoted defendant knew plaintiffs relied and based their sales of said three cars of coal shipped and sold thereafter, and then forcing plaintiffs to pay a greater rate, amounting in the aggregate to the sum of \$140.18, on said three cars of coal, thereby causing plaintiffs loss and damage in the said sum.'

"To this pleading the appellant answered by general demurrer and general denial, and especially denied that it ever entered into any contract for the shipment of coal for appellees from Coal Hill, Arkansas, to Weathford, Texas, at the rate alleged in appellees' statement; and further, that if it ever quoted any such rate to appellees, such quotation was a violation of the interstate commerce act, and was a lower rate than the interstate rate in effect at the time shipment was made, which had been duly published, printed, and posted in its depot and stations, as required by the terms of the act; and further, that it collected from appellees the exact rate prescribed for such commodity under such act, and that such contract, if any was made, was in violation of law, and void. Upon a trial without a jury judgment was rendered for the appellees for the amount sued for and all costs of suit.

"It is agreed by the parties that the rate charged and collected on the shipments of coal in controversy from Coal Hill, Arkansas, to Weatherford, Texas, as shown in appellees' statement of cause of action, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas & Pacific Railway Company on file with the Interstate Commerce Commission, and posted in the stations of said railway company, as required by the interstate commerce act. There is no assignment challenging the sufficiency of the evidence to support the material allegations of appellees' pleadings."

The supreme court of Texas having answered that the railroad company was liable "for damages occasioned by the misrepresentation of the rate of freight as shown by the statement of facts" (98 Tex. 352, 83 S. W. 800), the court of civil appeals affirmed the judgment against the railroad company. Thereupon this writ of error was prosecuted.

Messrs. John F. Dillon, Winslow S. Pierce, David D. Duncan and Thomas J. Freeman for plaintiff in error.

No counsel for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court:

This case is within the principle of and is ruled by the decision in *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802. Upon the authority of that case the supreme court of Alabama denied the liability of a railroad company in a case of similar character to that under review. South-

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ern R. Co. v. Harrison, 119 Ala. 539, 43 L. R. A. 385, 72 Am. St. Rep. 936, 24 So. 552. The opinion of Chief Justice Brickell so aptly reviewed and declared the effect of the decision in the Hefley Case that we adopt the same in disposing of the present controversy. The Alabama court said:

"In *Gulf, C. & S. F. R. Co. v. Hefley*, *supra*, the plaintiff sued to recover damages for the refusal by the carrier to deliver goods consigned to him, after tender of payment of the stipulated charges named in the bill of lading. The goods, a lot of furniture, had been received by the carrier at St. Louis, Missouri, for transportation to Cameron, Texas, at a stipulated rate, specified in the bill of lading, of 69 cents per 100 pounds, the charges amounting to \$82.80, whereas the published schedule rate in force at the time was 84 cents, and the charges should have been \$100.80; and the plaintiff, as in this case, was ignorant of the fact that the rate obtained was less than the schedule rate. It was held, in an opinion by Brewer, J., that the plaintiff was not entitled to recover. It is true that the only question discussed in the opinion was whether or not the interstate act superseded the Texas statute, which prohibited a common carrier from charging or collecting from the owner or consignee of freight a greater sum than that specified in the bill of lading, and this question was decided in the affirmative. * * * But this was not the only effect of the decision, and it is by its effect on the rights of the parties to such a contract, by whatever process of reasoning the decision may be reached, that the state courts are bound. The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one state to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that, whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other states are bound."

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

HILTON LUMBER CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, April 17, 1906.)

[53 S. E. Rep. 823.]

Carriers—Discrimination against Shippers—Action by Shipper—Complaint.—Revisal 1905, § 3749, provides that if any carrier shall collect from any person a greater compensation for transportation of property than it receives from any other for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances, it shall be liable to a fine of a specified sum in an action by a shipper to recover a sum alleged to have been paid defendant railroad on account of discriminating overcharges, it was proper to refuse to dismiss the action, on the ground that the complaint did not set forth the exact date of the shipments by plaintiff and did not state the dates and times that defendant had received a lower rate for the same kind of shipments from other persons, as defendant might have asked for a bill of particulars under Revisal 1905, § 494, providing that it shall not be necessary for a party to set forth in a pleading the items of an account, but that he shall deliver a copy thereof after demand.

Same—Evidence—Competency.—In an action by a shipper against a carrier to recover sums paid on account of discriminating overcharges, in violation of Revisal 1905, § 3749, testimony of a witness in regard to shipments from a point without the state to a point within the state, was not inadmissible on the ground that such shipments were interstate and not within the control of the state courts.

Same.—It was competent to show the rates charged to others for shipments over other branches of the road, it appearing that the conditions were substantially similar.

Same—Question for Jury.—In an action by a shipper against a carrier to recover sums paid on account of discriminating overcharges for shipments in violation of Revisal 1905, § 3749, evidence considered and held, that it was a question for the jury whether the railroad had practiced the alleged discrimination.

Same—Statutory Regulations.—Revisal 1905, § 3749, provides that if any carrier shall collect from any person a greater compensation for transportation of property than it receives from any other for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances, it shall be liable to a fine of a specified sum. Held, that the word "contemporaneous" means a period of time through which shipments of freight are made by one shipper at one rate, and by other shippers at another rate.

Same—Burden of Proof.—In an action by a shipper against a carrier to recover on account of discriminating overcharges, in violation of Revisal 1905, § 3749, the burden is on plaintiff to show such discrimination by the greater weight of the evidence.

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Same—What Constitutes Discrimination.*—A carrier may not give one customer a lower rate for the shipment of logs, than another, merely because the former ships the manufactured product over the carrier's line.

Appeal from Superior Court, New Hanover County; Council, Judge.

Action by the Hilton Lumber Company against the Atlantic Coast Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff sued for the recovery of \$3,865.26, alleged to have been unlawfully demanded and paid defendant company on account of discriminating overcharges for shipment of logs over defendant's road from the 15th day of November, 1898 to the 30th day of April, 1901. Plaintiff alleged that, between said dates, the defendant company, a common carrier, unlawfully charged and demanded of plaintiff an unreasonable and discriminating rate of \$2.50 per thousand feet for hauling its logs from Musteen's Crossing to the city of Wilmington, a distance of 39 miles, whereas during the said time, defendant charged other persons and corporations for shipment of logs for a like distance to said city, only \$2.10 per thousand. That, after protest against such discrimination, plaintiff applied to the corporation commission of the state, whereupon said commission ordered defendant to reduce its rate to \$2.10 per thousand feet. That between said dates plaintiff shipped logs from said crossing to Wilmington, aggregating 9,663,160 feet for which it paid at the rate of \$2.50 per thousand feet, the sum of \$24,157.90. That the amount which should have been paid at \$2.10 per thousand feet would have been \$20,292.64, the difference between said amounts being \$3,865.26. The plaintiff demanded payment of said amount, etc. Defendant admitted the plaintiff had paid the sum named for hauling logs between said points, but denies that same was either unreasonable or discriminating. Defendant denied that the rate of \$2.10 per thousand feet was a reasonable or proper rate for carrying plaintiff's logs and says there was a substantial difference, both in conditions and circumstances, between logs shipped over its road at \$2.10 per thousand feet and those shipped by plaintiff at \$2.50 per thousand feet. That the \$2.10 rate applied only to mills to which logs were shipped and from which it was afterwards reshipped in the form of lumber or its manufactured

*For the authorities in this series on the question what constitutes discrimination on the part of a carrier of freight, see foot-notes appended to *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 18 R. R. R. 366, 41 Am. & Eng. R. Cas., N. S., 366; foot-notes appended to *Central of Georgia Ry. Co. v. Augusta Brok. Co.* (Ga.), 16 R. R. R. 634, 39 Am. & Eng. R. Cas., N. S., 634; foot-notes appended to *Hilton Lumber Co. v. Atlanta Coast Line R. Co.* (N. Car.), 15 R. R. R. 729, 38 Am. & Eng. R. Cas., N. S., 729; foot-notes appended to *Choctaw, O. & G. Ry. Co. v. State* (Ark.), 14 R. R. R. 395, 37 Am. & Eng. R. Cas., N. S., 395.

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products. The other material allegations were denied. After the pleadings were read, the defendant moved ore tenus to dismiss the action upon the ground that it did not state a cause of action upon which plaintiff was entitled to recover, in that it did not set forth the exact dates of the shipments of the logs, which it claimed to have shipped over defendant's road and did not state that at the same dates and times the defendant was charging, collecting, and receiving from other persons a lower rate of freight for the same kind of shipments. Motion overruled, and defendant excepted. Defendant admitted its liability to plaintiff for the sum of \$91.98, being the excess of \$2.10 per thousand feet collected from plaintiff on shipment of logs from March 20, 1901, to April 30, 1901, the commission having fixed the rate at \$2.10 on March 20, 1901, and defendant not having observed or adopted it in shipment of plaintiff's logs until April 30, 1901. At the conclusion of the plaintiff's evidence defendant demurred and renewed its motion to nonsuit the plaintiff. Motion denied, and defendant excepted. The court upon the trial submitted the following issues to the jury: "(1) Did the defendant unjustly and illegally discriminate against the plaintiff in the matter of freight rates or transportation of logs, as alleged? (2) Did defendant unlawfully collect of plaintiff freight from November 15, 1898, to April 30, 1901? (3) If so, what sum, if any, is plaintiff entitled to recover?" At the conclusion of the entire evidence defendant renewed its motion for judgment as of nonsuit, which was denied and defendant excepted. Verdict was rendered upon the issues, and there was judgment for plaintiff. Defendant excepted, and appealed.

Junius Davis, for appellant.

Rountree & Carr, for appellee.

CONNOR, J. (after stating the facts). In the complaint some reference is made to an agreement entered into by the Wilmington & Weldon Railroad Company, to whose rights and contracts the defendant succeeded, and the predecessor of plaintiff in regard to hauling logs. The cause was heard and determined, as appears from the record, upon the sole question whether during the periods named in the complaint defendant company demanded and received payment from plaintiff a rate of freight in excess of that charged other persons or corporations for the same service under substantially similar conditions. The learned counsel in his brief says: "The action is not in tort, but ex contractu. Plaintiff charges that the defendant required it to pay \$2.50 per thousand feet for hauling logs in car load lots a distance of 40 miles when defendant had a regular, established, and published rate for other portions of its line * * * of \$2.10 for the same service and the same rates applied at Wilmington for all who would agree to give the defendant the output of their mills." The defendant denied the allegations upon which plaintiff's alleged cause of action is founded. It says further, that assuming the

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law to be as contended by the plaintiff it has not shown by any competent testimony that, at the date of shipments made over its road, defendant was charging and receiving from other persons a less rate of freight than that charged plaintiff for a like service in the transportation of like traffic contemporaneous in point of time and under substantially similar circumstances. The record contains exceptions to the ruling of his honor, presenting every phase of these controverted questions. It will be observed that the foundation of plaintiff's claim is not, that the rate charged plaintiff was, except in so far as it was related to the lower rate charged, unreasonable. The gravamen of the complaint is that the rate was discriminating and by reason thereof, unlawful. Plaintiff claims that it has a right to demand of defendant (1) that it haul the logs at a reasonable rate; (2) that it haul them at the same rate charged other persons for hauling logs over the same distance, at the same time, and under substantially similar circumstances. This right it charges, defendant has infringed and thereby demanded and received for hauling its logs, between the dates named, the amount sued for, in excess of the amount which it was entitled to receive; and in good conscience, defendant should repay this amount and it sues as for money had and received to its use. The agreement referred to in the complaint is eliminated by plaintiff's averment that it is suing to enforce its right at common law, of which section 3749 of the Revisal of 1905 is but declaratory, to have equality in rates, etc. It will be observed, as said by Clark, C. J., in *Lumber Co. v. Railroad Co.*, 136 N. C. 479, 487, 48 S. E. 813, 816, that this statute is substantially like that portion of the English "Traffic Act," known as the "Equality Clause" and the "Interstate Commerce Act." These and similar statutes are said by many of the courts to be but declaratory of the common law, which required all public carriers to serve all persons at reasonable rates and upon equal terms under similar circumstances. However that may be, the fundamental purpose underlying all of this legislation both in England and this country, is, as said by Mr. Justice White, in *Railroad Co. v. Interstate Commission*, 26 Sup. Ct. 272, 50 L. Ed. —, that: "Whilst seeking to prevent unjust and unreasonable rates to secure equality of rates as to all and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of unjust discrimination, to this extent and for these purposes, the statute is remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

Referring to provisions in charters of railway companies having for their purpose the guaranty that all persons should have equal-

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ity of right in the use of facilities afforded by common carriers, Tindall, C. J., in *Parker v. Great Western R. R. Co.*, 49 E. C. L. 252, 287, says: "Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public." Blackburn, J., in *Great Western R. Co. v. Sutton*, L. J. 1869 N. S. 38, 177, after reviewing the several acts of Parliament on the subject, says: "I think the construction of the proviso for equality is equally clear and is that the company may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they do, during the same time, charge to others under the same circumstances." The evil intended to be remedied is the prevention of unjust discrimination, or, to put the proposition affirmatively, to secure to every person constituting a part of the public, an equal and impartial participation in the use of the facilities which the carrier is capable of affording and which it is its duty to afford. It is an elementary rule that statutes shall be so construed as to repress the evil and advance the remedy. We held in this case—*Railroad Discrimination Case*, 136 N. C. 479, 48 S. E. 813—that upon the facts set out in the complaint and substantially the same testimony, that the discrimination was unlawful. In other words, that defendant could not rightfully charge the plaintiff \$2.50 per thousand feet for hauling its logs, if it, at the same time, for the same service, under substantially similar circumstances, carried logs for other persons at \$2.10 per thousand feet in consideration of the shipment of the manufactured products over its road. This proposition, the learned counsel does not ask us to reconsider. He contends that the plaintiff has neither alleged nor proven such a state of facts. We have discussed the law only in so far as the general principles governing the right of plaintiff and duty of defendant enable us to approach the decision of the several exceptions of defendant to specific rulings of his honor.

The first exception is to the refusal to dismiss the action because the complaint did not set forth the exact dates of the shipments of logs by plaintiff over defendant's road, and does not state the same dates and times that defendant had charged and received a lower rate for shipment of logs from other persons. The argument upon this exception made by defendant's counsel in his brief takes a rather wider range than the causes of demurrer assigned in the record. He says that it is not charged in the complaint that any service of a like kind was rendered contemporaneously by defendant for any other person at a lower rate than was charged plaintiff. The complaint appears to have been drawn with a "double aspect"; that is, eliminating the reference to the agreement, it charges that the rate charged plaintiff was unreasonable. It also avers that a reasonable and proper rate "having reference to the charges to other shippers and under like conditions and circumstances would not have been more than \$2.10 per thousand feet. That the charge to the plaintiff of \$2.50 per thousand feet when others are charged only the rate of \$2.10

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per thousand for the shipment of logs for a like distance to the city of Wilmington * * * is discriminating and unreasonable. While the charge in respect to the facts relied upon is not so explicit as it may have been, it is evident that defendant was not misled. In paragraph 6 of its answer the defendant "denies that the rate of \$2.10 per thousand feet would have been or was a reasonable and proper rate of freight under the circumstances, and alleges that there is a substantial difference both in conditions and circumstances between the timber shipped by plaintiff over the defendant's road at the rate of freight of which the plaintiff complains in its complaint and the rate of \$2.10 per thousand feet, and the defendant avers that the conditions and circumstances under which the rate of \$2.10 per thousand feet was charged by it were substantially different; for this rate applied only to mills to which the timber was shipped, and from which it was afterwards reshipped over defendant's lines in the form of lumber or its manufactured products." If desired it may have demanded a more specific statement. In regard to the exception to the complaint for indefiniteness as to dates, etc., defendant might, if it so desired, have asked for a bill of particulars. Revisal 1905, § 494. The ruling of his honor was correct.

We proceed to consider the other exceptions in the order presented in the brief of appellant, omitting any reference to such exceptions as are not argued, except the forty-fourth. Counsel stated that, with that exception, they were abandoned. The fourth to seventh, inclusive, are pointed to the admission of testimony of Mr. Parsley for that his statements were general and did not fix dates of shipment, etc. The plaintiff was, by this testimony laying the foundation upon which he was seeking to show the character of its business, the number of lines or branch roads of defendant, their terminal points, the number, etc., of mills on such lines, its own dealings with defendant. For those purposes we see no valid objection to the testimony. The 16th exception is for that the witness was permitted to testify as to logs shipped from a point in South Carolina to Wilmington, N. C., which was interstate and not within the control of the state courts. We do not perceive how the testimony involved interstate commerce. It was relevant to the issue and tended to show the manner of dealing by defendant company with persons shipping logs over its lines coming into Wilmington.

Exceptions 21 to 30 present the question whether for the purpose of showing the discrimination alleged it was competent to show the rates charged other persons for shipment of logs in car load lots over branches of defendant's road not coming into Wilmington; for instance, Mr. Hines, who operated a mill at Kinston to which logs were hauled from other points on defendant's road, was permitted to testify in regard to the rates paid for shipping car load lots. Mr. O'Berry, at Goldsboro, was also permitted to testify to the same effect. The question at issue was

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whether defendant, while charging plaintiff \$2.50 per thousand for hauling logs 39 miles from Masteen's Crossing to Wilmington, was charging other persons \$2.10 for the same service under substantially similar circumstances. To give any beneficial or remedial effect to the law, either common law or statute, it must be given a reasonable construction. Certainly to show that in a few cases and within a short period lower rates were given other persons would not establish unlawful discrimination. It is therefore essential to plaintiff's right to recover for it to show that a regular systematic discriminating rate was given. Nor do we conceive that it is necessary for plaintiff to show that the lower rate was confined to persons shipping logs into Wilmington. If it is made to appear that during the period named the defendant was giving to mill owners at Kinston, Goldsboro, or other points on its line, a lower rate than that given to persons living in Wilmington, the conditions being substantially similar, such discrimination would be unlawful. To so construe the law as to permit a railroad to charge a person shipping logs in car load lots to Wilmington, a distance of 39 miles, \$2.50 per thousand and to charge a person shipping in the same way over the same distance to other points \$2.10 in the absence of any circumstances or conditions justifying the discrimination, would practically nullify the underlying principle upon which it is based. The real and pivotal question is whether the difference in charges are contemporaneous in point of time and under substantially the same circumstances. The purpose of the testimony was to establish this proposition. The principle involved is announced by Blackburn, J., in *Great Western Railway v. Sutton*, *supra*: "When it is sought to show that the charge is extortionate as being contrary to the statutory obligations to charge equally, it is immaterial whether the charge is reasonable or not, it is enough to show that the company carried for some other persons or class of persons at a lower charge during the period throughout which the party complaining was charged more under like circumstances. One single act charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, week, or month, whatever the period might be. I think it would be necessary to show that there was a practice of carrying for some persons or class of persons at the lower rate. But a single instance would be evidence to prove this practice. * * * It would be of the very essence of the case to prove that the goods were of the same description and came under the same circumstances." We think that the testimony was relevant and that it was sufficiently definite to go to the jury. The witnesses were asked in regard to rates charged them for longer and shorter distances than that over which plaintiff's logs were shipped. If this was error, we do not perceive how defendant was prejudiced by it.

Exceptions 31 to 34 are to allowing Mr. Parsley to testify that he had seen logs moving on the defendant's branch lines, the

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objection being that he could not name the dates accurately. The testimony was, in the light of his honor's charge confining the inquiry of the jury to the dates fixed in the issue, entirely harmless.

Exceptions 36 and 37 are disposed of by what it said in regard to exception 16. This disposes of the exception directed to the admission of evidence.

At the close of plaintiff's evidence defendant demurred and demanded judgment of nonsuit, which was denied. Defendant waived its exception to this ruling by introducing evidence. Assuming that plaintiff had introduced testimony which, for the purpose of disposing of the motion for judgment of nonsuit was fit to go to the jury we are brought to a consideration of defendant's motion to nonsuit at the close of the entire evidence. This motion involves the assumption that plaintiff's evidence was insufficient, and that nothing has been shown by defendant to aid the defective condition of plaintiff's case. Assuming that plaintiff has introduced evidence fit to be submitted to the jury to show that between the dates named it paid defendant \$2.50 per thousand feet for hauling logs from Musteen's crossing to Wilmington in car load lots and that during the same period defendant gave to other persons a \$2.10 rate for hauling logs in car load lots the same distance, and that such lower charge was general—that is, a practice was made of doing so—does defendant's evidence aid the plaintiff in showing either that the conditions were substantially similar, or if not, whether the conditions justified the difference in the rates. Mr. Emerson, who was defendant's traffic manager, testified that he made the rates on logs hauled over defendant's road. He was shown and identified a number of printed tariffs showing rates at a number of points on the road and branches. He testified that there was at no time a rate of \$2.10 per thousand feet for logs shipped to Wilmington, a distance of 39 or 40 miles. The only portion of his testimony which could in any aspect aid the plaintiff, is the statement in reply to a question by plaintiff's counsel. "You asked, as I understand it, why it was that we applied a higher rate on logs to Wilmington, N. C., than we applied to other towns over our lines; I will answer that by saying that the revenue received on the product of the logs from the points in Eastern Carolina named in the testimony, and for which tariffs have been filed, enabled us to haul the logs to the mill at a lower figure than we felt that we could afford to handle the logs to a mill without getting any of the product. We were prepared to make the same arrangement effective—I will change it. We offered that if the product of the logs were shipped out we were prepared to make the same rates effective to the Wilmington mill on the logs on which we received the product as were applied to any other mill on the line of our road." Mr. Emerson, in reply to another question, testified: "The Hilton Lumber Company paid no more for logs they desired to move than would be paid by the Cape Fear or Angola Lumber Com-

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pany. * * * We have in effect, between certain points on the Wilmington & Weldon Railroad where logs are moving to mills and where we receive for shipment the lumber cut from said logs, rates as per the following table: '40 miles and over 30, \$2.10.' You will note that these rates are somewhat lower than the rates we were charging on logs moving to Wilmington and other points where we do not receive a second movement in the way of lumber cut from the logs moved." The date fixed by witness is November 12, 1900. He does not state when this rate went into effect: "That they did not apply over the entire Atlantic Coast Line." We omit any reference to the charge of \$2.10, which witness said was made by mistake. Assuming that there is sufficient evidence in regard to shipments of plaintiff and of witnesses testifying in regard to shipments from other points to go to the jury, we have, with Mr. Emerson's testimony, this case, presented on defendant's demurrer. Defendant operating several lines or branches of railroad in Eastern North Carolina, upon which are located several saw mills deriving their supply of logs over such lines as are convenient to them, maintains a tariff by which it charges mills in Wilmington \$2.50 per thousand feet for car load lots a distance of 39 miles and mills at other points \$2.10 for the same service, the difference being that it handles the manufactured products of the logs thus shipped at points other than Wilmington and was willing to make the same rates effective to the Wilmington mill on the logs of which it handled the product.

Thus stated, assuming the other conditions to be substantially similar, is the discrimination unlawful? The question is answered by this court in the defendant's appeal at the fall term, 1904, *supra*. Clark, C. J., says: "The proposition is that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line), which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff." The authorities are reviewed in the opinion, and we have no disposition to disturb the reasoning or conclusion reached on that appeal.

Since the rendition on that decision, the Supreme Court of the United States has, in an able opinion, discussed the principles involved in this case and applied them to a correction of the evil of unjust discrimination which goes to the root of the matter; saying that the statute was remedial and to be given a construction which reasonably accomplishes the great public purpose which it was enacted to subserve. "Nor, in view of the positive command of the second section of the act that no departure from the published rate shall be made 'directly or indirectly' how can it in reason be held that a carrier may take itself out from the

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statute in every case by simply electing to be a dealer and transport a commodity in that character. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rate shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." In an exceedingly strong opinion by Mr. Justice Doe in *McDuffee v. Railroad*, 52 N. H. 430, 13 Am. Rep. 72, it is said: "A common carrier is a public carrier. He engages in a public employment and takes upon himself a public duty and exercises a sort of public office. * * * His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right." After an interesting discussion and review of English cases the learned justice says: "In charters of common carriers what is called the equality clause was inserted, requiring the carriers to furnish transportation on equal terms. The fashion of legislation, once set, was studiously followed with a degree of reverence for precedent that does not prevail in this country. General statutes were passed enacting the common-law doctrine of reasonable equality, and new methods of enforcing it were introduced. And the practice of the English courts on charters and general acts of this kind, has been so long continued that the fact seems now to be overlooked that the general principle of equality is the principle of the common law. * * * It seems to have been a result of the anxiety of Parliament that instead of merely providing such new remedies and modes of judicial procedure as they deemed necessary for the enforcement of the common law, they repeatedly re-enacted the common law until it came to be supposed that in such an important matter as the public service of transportation by common carriers the public were indebted for the doctrine of equal right to the modern vigilance of Parliament instead of the system of legal reason which had been the birthright of Englishmen for many years. A mistake of this kind is of some magnitude. It unjustly weakens the confidence of the community in the wisdom and justice of the ancient system and impairs its vigor." After pointing out the tendency sometimes seen to give a narrow construction to such statutes upon the theory that they are changes in the common law, he says: "But the common law of equal right and reasonableness is the ground on which we stand." The action in *Parsons v. Ch. & N. W. Ry.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231, was brought for a violation of the interstate commerce act, and the decision is based upon the language of the statute. It is true that Mr. Justice Brewer says: "So, but for the provisions of the interstate commerce act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor no matter though it appeared through any mistake or partiality on the part of the railway officials' shippers in Nebraska had been given a less rate." The action was brought to recover a penalty and of course it was

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necessary to show that the provisions of the statute had been violated. In commenting upon this interesting subject, we note the following language in an editorial notice in the *Havard L. R.*, vol. 19, No. 6, p. 453, of the recent decisions of the Supreme Court of the United States in *N. Y.*, etc., *R. R. v. Int. State Com.*, *supra*: "It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. So dependent are all commercial activities upon adequate service by the great companies which conduct these public employments, that the general situation demands the stern code that all who apply shall be served with adequate facilities for reasonable compensation, and without discrimination. Enforcement of all branches of this law is necessary at all times; but the commercial community is most interested to-day in the prevention of personal discrimination. It is established now, past all qualification, that it is the duty of the common carrier to serve all alike who ask the same service, so that all shippers from a given point may compete with each other in distant markets upon equal terms. For it is now recognized that the slightest differences in the rate may result in the long run in building up one concern and in ruining its rival." Judge Noyes, in his work on *American Railroad Rates* (page 103), after stating the general doctrine in a note, says: "While the rule of the common law is undoubtedly correctly stated in the text, it has not been followed by several American courts of high standing. In fact, at the present time, it is probable that the weight of American authority is in favor of equal charges to all persons for similar services, even in the absence of statutory provision."

We think that the strict construction heretofore given the act by the federal courts must be modified to conform to and promote the purpose of the legislation—to enforce by appropriate remedies the great common-law doctrine of equality of service by public agencies of all kinds. The decision referred to points strongly in that direction. However the courts construe statutes making penal or criminal a violation of the equality of right, when we come to deal with the question, in the enforcement of the civil right of the citizen, we must construe the law so that the right is secured and the remedy for its infringement given. This is the key note of the decisions both in England and this country. In *Directors, etc., v. Evershed*, 3 App. Cas. 1029, Lord Hatherly says: "According to the strict meaning of the acts of Parliament, as interpreted by the decisions from the very moment that the company charges A. a given sum when B., another person, comes to the company to have the same service rendered under the same circumstances, he cannot be charged one farthing more than has been charged A."

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He can only be charged precisely what the act authorized the company to charge, namely, that which has been charged others and the moment the directors take on themselves to charge less to another person, they must charge less to him, too." *Hays v. Penn. R. Rd. (C. C.)* 12 Fed. 309; *L. E. & St. L. R. R. v. Wilson*, 18 L. R. A. 105, note. Defendant says there was no evidence tending to show that at the time it was shipping logs and paying \$2.50 rate any other person was shipping under similar circumstances at the \$2.10 rate. Mr. Parsley swore to the payment of the \$2.50 rate by defendant. It appears that mills were being operated, receiving logs over defendant's line at different points during the time named. Mr. Emerson says that defendant was operating these lines, had a tariff for logs giving the basis of it, he says that he was traffic manager. Mr. Hines and others say that they were operating mills shipping logs over defendant's line, etc. It is true that no one says that on any given day logs were shipped and the \$2.10 rate paid, but in view of the well known fact that men do not keep saw mills standing idle or railroads keep cars idle when it can be avoided, nor ship freight without payment therefor, the jury may well have found that they were shipping logs over defendant's lines at the rates fixed by the tariffs. Mr. Hines says: "We own some timber which came over the Coast Line * * * sawed probably two or three million feet. Other witnesses testified to the same effect. It would be impossible for any one to recover for discrimination in freights unless testimony of this character could be received and submitted to the jury. Whether the testimony was true and what reasonable inferences were to be drawn from it was for the jury. *Interstate Comm. v. Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414. We do not think that his honor was in error in denying motion for nonsuit.

His honor charged the jury: "That the word contemporaneous in the statute did not mean the exact day, hour, or necessarily month, but that it meant a period of time through which the shipment of goods or freights were made by plaintiff at one rate, and by other shippers at another rate." To this defendant excepted. His honor, in the same connection, told the jury that the burden was on the plaintiff to satisfy them by the greater weight of the evidence, that during the period of time named in the complaint the discriminating rate was charged. We find no error in this instruction. His honor, after defining the duty of the defendant to give equal rates, said: "If, therefore, you find from the evidence in this case that the defendant company extended to shippers of logs who did agree with defendant that after the shipment of logs over its line of road, that the logs when manufactured into lumber at the saw mill of the shipper would be reshipped over defendant's line of road, even though this was open to all saw mill owners or shippers doing business at any point along the line of the road, and you find that other saw mill owners or shippers who were shipping logs and manufactured

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lumber over defendant road under like conditions, but who did not accept or agree to the terms so held out or extended were not given this lower rate, then the court charges you that those accepting the lower rate, if you find from the evidence that any such did, would fix the rate at which other shippers who did not accept the rate would in law be required to pay, and any sum demanded or collected of any shipper not conforming to such agreement in excess of the lower rate would be in violation of the law. If, therefore, you find from the evidence in this case that a schedule of shipping rates during the period of time from the 15th of November, 1898, to March 20, 1901, was maintained and promulgated by the defendant company, by the terms of which they extended to shippers a rate of \$2.10 per thousand in car load lots of lumber shipped over its line within the distance of from 30 to 40 miles, such rate extending only to those who might ship the manufactured product again over defendant's line, and you further find from the evidence that on other portions of the defendant's road that it charged other shippers—or charged the plaintiff—\$2.50 a thousand feet, the shipments made for a like distance and under substantially the same circumstances and conditions and contemporaneously, then the plaintiff would be entitled to have the first issue answered 'Yes.' Defendant excepted (exception 43). Whatever cause for criticism to be found in this language is removed by reading it in connection with that immediately following: "It will not be alone sufficient for the plaintiff to satisfy you from the evidence in the case that two rates of freight were maintained by the defendant company, or rather, that a rate was extended to one class of shippers who might return the manufactured product over their road, and another rate to those who did not elect to accept this rate and do so, but the plaintiff must go further and satisfy you from the evidence that at the time such rates were maintained (if you find from the evidence they were so maintained), that it was during this period shipping lumber over defendant's road a like distance, under substantially the same conditions, and paying a higher rate of freight to the defendant company than the first-mentioned class." Thus read, we see no error in the instruction given. We find it difficult to discuss the exceptions separately, because, in some instances, they are interjected between sentences which are connected and can only be understood when so read. Many of the exceptions are pointed to the statement of the contention of the parties. The charge is very full, covering several pages in the record. We have given to it a careful examination and are of the opinion that it accords with the decision of this court. In dealing with the testimony in regard to the charge made the Angola Company alleged by defendant to have been the result of a mistake, his honor instructed the jury that if they so found they should dismiss it from further consideration. He further instructed them that having admitted the fact it was incumbent upon defendant to show that the lower rate, which unexplained,

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was discriminating, was charged by mistake. There really seems to be no evidence to the contrary, and it would seem that the particular item had but little effect upon the case. No special instructions were asked by either side. A careful examination of the charge shows that his honor correctly instructed the jury that if they found the facts in regard to the several rates as alleged by the plaintiff they must further find, before answering the issue in the affirmative, that the shipments for the lower rate were for a like distance and under substantially the same circumstances, and this we understand to be the test which distinguishes a lawful from an unlawful discrimination. It is not denied that all the shipments of the logs were in car load lots, nor is it claimed that the cost of handling the freight coming into Wilmington was greater than that going to other points.

The real controversy made upon the first appeal, and again presented upon this record, is whether, assuming the facts to be as plaintiff claims, the defendant could give a lower rate to such of its customers as shipped the manufactured product of the logs over its line and, as we have seen, that question has been decided adversely to the defendant's contention. The only case to which our attention has been directed which would tend to sustain the contention is the *L. & N. R. Co. v. Comm.*, 57 S. W. 508, decided by the Supreme Court of Kentucky. We have examined that case with care, and think that the dissenting opinion of Paynter, J., in which two of the other judges concurred and which fully sustains the view taken by this court, and we think supported by authority and reason, is the sound view of the question. The defendant does not controvert the plaintiff's right to recover for money had and received, provided the facts are as alleged. In *Western Railroad v. Sutton*, *supra*, the action was for money had and received for a discriminating freight rate charged and paid. It was held in that case that where a higher charge was paid than that charged other shippers, the payment was not to be considered voluntary and the excess might be recovered back upon account for money had and received. The authorities are uniform upon this question. It is not necessary that at the time of payment there should have been any protest. As said by the Supreme Court of Alabama in *Mobile M. R. Co. v. Steiner*, 61 Ala. 559, in an action like this: "The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation and if the shipper pays the rates established in violation of the law to the carrier rather than forego his services, such payment is not voluntary in the legal sense and the shipper may maintain his action for money had and received to recover back the illegal charge." There seems to be no conflict of authorities upon this question. His honor gave judgment for the amount sued for and interest, to which defendant excepted. We think his honor was correct. The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully, and the law implies a

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promise to repay it. The action was originally equitable in its character and founded upon the theory that in good conscience the defendant should repay the money wrongfully received, and from this duty the law implied a promise so to do. We see no reason why the amount should not draw interest. Revisal 1905, § 1954; *Barlow v. Norfleet*, 72 N. C. 535; *Farmer v. Willard*, 75 N. C. 401. The cases cited by defendant were actions in tort, wherein the jury may or may not allow interest, as they see proper. In this lies the distinction.

Upon a careful review of the entire record, we find no reversible error. The judgment must be affirmed.

BROWN, J., did not sit.

CHICAGO & E. I. R. Co. v. CHESTNUT BROS.

(Court of Appeals of Kentucky, Nov. 15, 1905.)

[89 S. W. Rep. 298.]

Carriers—Carriage of Goods—Statement of Consideration.—Under Ky. St. 1903, § 470, providing that the consideration in written agreements need not be stated therein, a carrier is liable under a written contract of shipment for failure to deliver the cargo in due season, though the contract did not state the consideration.

Same—Connecting Carrier—Through Shipment—Contract.*—Where a bill of lading issued by an initial carrier showed that it was a contract for a through shipment, when the goods were delivered to the connecting carrier and carried by it under the bill of lading, such carrier became a party to the original contract by adoption and ratification.

Same—Delay in Delivery—Damages.†—Where a carrier failed to deliver a shipment in due season, but the shipper's agents were guilty of delay in unloading the cargo after it was delivered for unloading, damages accruing after delivery by the carrier were not chargeable to it, although such damages occasioned by the delay of the agents would not have occurred, but for the carrier's original negligence.

Same—Instruction.—In an action against a carrier for damages to

*See *Mears v. New York, etc., R. Co.* (Conn.), 3 R. R. R. 668, 26 Am. & Eng. R. Cas., N. S., 668; note, 7 Am. & Eng. R. Cas., N. S., 713; *Kansas City Ft. S. & M. Ry. Co. v. Sharp* (Ark.), 7 Am. & Eng. R. Cas., N. S., 710; extensive note appended to *Alabama & N. Ry. Co. v. Lamkin* (Miss.), 21 Am. & Eng. R. Cas., N. S., 867; *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 429 (intermediate carrier can not object to notice of loss provided for in bill of lading); *Gulf, C. & S. F. R. Co. v. Edloff* (Tex.), 3 Am. & Eng. R. Cas., N. S., 453; *Alabama & N. Ry. Co. v. Lamkin* (Miss.), 21 Am. & Eng. R. Cas., N. S., 867 (connecting carriers as partners); *Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co.* (Kan.), 2 Am. & Eng. R. Cas., N. S., 560.

†For the authorities in this series on the question, what is, and is not the proximate cause of an injury, see preceding case and footnotes

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a shipment owing to delay in delivery, there was evidence that after the shipment was delivered for unloading there was a negligent delay on the part of the shipper's agents, and the court instructed that, if by reason of the delay on the part of the carrier the shipment was damaged, the jury should find for plaintiff such damages as he sustained by reason of the delay. Held, that the instruction was erroneous, in that the jury might have concluded that all damages accruing after the failure to deliver on the part of the carrier were recoverable from it.

Same.—In an action against a carrier for damages to a shipment owing to delay in delivery, the court should instruct the jury, defining the measure of damages.

Action—Nature—Delay in Delivery of Freight.†—In an action against a carrier on a contract of shipment for delay in delivering the goods, an allegation that defendant was guilty of negligence did not convert the action from one *ex contractu* into one *ex delicto*.

Appeal from Circuit Court, Todd County.
"Not to be officially reported."

Action by Chesnut Bros. against the Chicago & Eastern Illinois Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Perkins & Trimble and E. H. Senff, for appellant.
Petrie & Stanard, for appellees.

O'REAR, J. Appellees shipped a car load of live poultry to themselves, in care of Brown & Son, commission merchants at Chicago, Ill., in December, 1898. The car was billed by the initial carrier, the Louisville & Nashville Railroad Company, over its line to Evansville, Ind., its terminus. The bill of lading purported to evidence a contract between the carriers, the Louisville & Nashville Railroad Company and its connecting lines, as parties of the first part to the contract, and the shippers, as the second party. The form of the bill is set out in the opinion delivered by this court on the former appeal, found reported in 115 Ky. 43, 72 S. W. 351 (*Louisville & Nashville Railroad Co. v. Chestnut*). The contract was an affreightment of live poultry from Trenton, Ky., to Chicago, Ill. Its course was not stated in the bill of lading, further than Evansville, Ind. Nevertheless, the whole document showed that the car was destined for Chicago, and was to be taken by the Louisville & Nashville Railroad part of the way, and then delivered by it to connecting carriers, who were to carry it the remainder of the distance and deliver it at the destination. Such connecting lines, when the car was delivered to them and was carried by them under the original bill of lading, became parties to the original contract by adoption and ratification of its terms. *P., C. C. & St. Ry. C. v. Viers*, 113 Ky. 526, 68 S. W. 469. It was proper for the trial court to have so

†See foot-notes appended to *Eckert v. Pennsylvania R. Co. (Pa.)*, 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475.

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treated the contract under the state of pleadings presented by the record. The discussion of the contract upon the former appeal was limited to its scope as to the liability of each of the carriers who were parties to it, it being held that each carrier's liability was by the terms of the writing limited to occurrences upon its own line.

We do not deem it material, as affecting the carrier's liability for failure to deliver the cargo in due season, that the contract did not state the consideration to be received by it. By statute in this state, the consideration of written agreements need not be stated therein. Section 470, Ky. St. 1903. The amount of consideration, or whether or not there was consideration to support the agreement, was not at issue in this case. The liability sought to be imposed upon appellant by this suit was for the damages resulting from its failure to deliver the car of fowls with reasonable dispatch, whereby a number of them were frozen and damaged. The proof is that the fowls were shipped from Trenton, Ky., on the night of December 11, 1898, after midnight, in a train that was then $2\frac{1}{2}$ or 3 hours behind its schedule time. The connecting trains seem to have been held for it, and the connections were made, but the car reached Chicago the morning of the 13th about 1 hour and 30 minutes late. There was no delay shown anywhere along the line up to the time the train reached appellant's Thirty-Third Street Station in Chicago. The delay complained of was in not transferring the car to the depot of delivery as promptly thereafter as appellant could and should have done. The proof was that some of the turkeys in the car died on the way to Chicago. Others were found dead in the car at the Thirty-Third Street Station upon the arrival of the train there. There was also evidence tending to show that some of the turkeys were in bad condition when shipped from Trenton. The fowls were shipped in an open car. The weather was cold, the mercury indicating a temperature below freezing. At Chicago the weather was blustery and snowing. The night after the arrival it turned considerably colder, the mercury registering about 2 degrees above zero. The car arrived at Thirty-Third Street Station about 7:45 a. m. December 13th. It was not delivered at the Twelfth Street Depot, its destination, till about 10:30 or 11 a. m. It was then set on what is called a "team track," described as a siding for loading and unloading cars when freight came in car load lots. Another siding adjacent gave access to a platform, flush with the floor of the car. It was from this last-named siding that the car was unloaded, and was preferred to be, because it gave facilities for weighing the turkeys as they were taken out of the car. Brown & Son, the commission merchants to whom the car was consigned by appellees, had hands and three teams at the Twelfth Street Station early in the morning of the 13th to unload the car. But, as it was not there, they went away to another depot to unload a car of poultry there, and were so engaged until about 2 o'clock p. m. There was

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some delay, after the car was set in on the sidings, by Brown's men in getting at the work. They were then unable to complete it that night, as they quit work at 4 o'clock p. m. Many more of the turkeys left in the car froze and died that night, and before they could be unloaded the following morning. From these facts it must be seen that appellants were not liable at all for fowls which died because of diseased condition when shipped; nor for those which died from exposure or other cause before they reached Chicago; nor for any that died or were damaged by reason of any negligence of Brown & Son in failing to remove them from the car after having had it so placed that they reasonably could have removed them before damage or death to them.

The only instruction given to the jury by the court was this one: "The court instructs the jury that if they should believe from the evidence that the defendant, the Chicago & Eastern Illinois Railroad Company, received from the plaintiffs, S. D. Chestnut & Bro., a car of poultry at its yards in Terre Haute, Ind., to be transported to Chicago and delivered to plaintiffs in the care of H. L. Brown & Son, and if the jury should further believe from the evidence that the said defendant failed, after receiving said car, to transport or deliver said poultry to said plaintiffs or H. L. Brown & Son in its yards in Chicago, at the usual and customary place for delivering freight of this character, with reasonable diligence and dispatch, and that by reason of said failure, if any, so to transport or deliver same, the plaintiffs' said poultry was damaged or injured, then the jury will find for the plaintiffs such compensatory damages, if any, as the plaintiffs sustained by reason of such failure, if any, to transport or deliver same, not exceeding \$600, the amount claimed; and unless the jury shall believe as set out in this instruction they will find for defendant." Appellees contend that this instruction clearly and unmistakably limits their recovery to the identical matters for which they may have properly recovered as above indicated. It may be conceded that technically the instruction may be so construed. It presented to the jury the plaintiffs' case. But it did not present the defense. The defendant was entitled to an explicit presentation for the determination by the jury of the matters which they claimed, and introduced evidence to sustain, was the cause of the loss. Let it be conceded that the carrier (appellant) did not transfer the car from its Thirty-Third Street Station to its Twelfth Street Station with reasonable dispatch, yet when it did deliver it there, though some of the fowls were damaged, as all were imperiled by the weather conditions, it was the duty of appellees' agents, the factors, to do what they reasonably could under the circumstances to prevent further loss and damage. Damages accruing thereafter are not chargeable to the carrier, although such damages would not have occurred but for the carrier's original negligence. This principle is fully discussed and applied in *Raleigh v. Clark*, 114 Ky. 732, 71 S. W. 857. This brings out more clearly the error in the instruction given, and

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shows wherein it may have been, and from the verdict apparently was, prejudicial to appellant; for the instruction given told the jury that if the carrier failed to deliver the car at the customary and usual place for delivering freight of this character, with reasonable diligence and dispatch, and that by reason of such failure said poultry was damaged and injured, the jury should find for the plaintiffs such compensatory damages as they sustained by reason of such failure, from which it was not unreasonable for the jury to deduce the conclusion that all damages accruing after the failure to so deliver the car were recoverable from the carrier under the instruction. In a sense, all the subsequent damages did result from such failure. Notwithstanding, where plaintiff's representatives upon the ground could have prevented it by ordinary care, to that extent it was not recoverable from the carrier. Additional instruction should have been given embodying these principles, and which were in substance covered by some of the instructions asked for by appellant. We think it would also be well to give the jury an instruction defining the measure of damages.

The contention is made also that the instruction given is erroneous, in that it failed to submit to the jury the question of appellant's negligence in failing to deliver the car as expeditiously as it reasonably could have done. Although negligence in this respect is charged in the petition, we think the action is, as it was treated by the trial court, *ex contractu*, and not *ex delicto*. The suit is for a breach of a contract, and not upon case. *L. & N. R. R. Co. v. Wathen*, 49 S. W. 185, 22 Ky. Law Rep. 82.

But for the error indicated the judgment must be reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

PINCUS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, March 6, 1906.)

[53 S. E. Rep. 297.]

Carriers—Passengers—What Constitutes the Relation.*—One having a mileage book good on a railroad and undertaking to board a train by passing along the platform of a freight warehouse where he had been to check his trunks by the invitation of the railroad, was a passenger.

*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

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Same—Stations and Grounds—Defective Platform.†—A carrier owed one attempting to board a train the duty of providing a safe platform, though the station was not a regular one, but merely a flag station.

Appeal from Superior Court, Edgecombe County; Webb, Judge.

Action by H. Pincus against the Atlantic Coast Line Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Thorne, Gilliam & Gilliam, for appellant.

John L. Bridgers, for appellee.

BROWN, J. The testimony most favorable to plaintiff tends to prove that he arrived at Sharpsburg on defendant's railroad, with his trunks, which were placed with checks on them in defendant's warehouse by direction of Dawes, defendant's agent, and they remained in custody of defendant while plaintiff was at Sharpsburg, which was from one train to the next south-bound train. The warehouse was on defendant's right of way, and used by defendant for freight purposes. Defendant's agent testified that passengers' baggage was stored and handled in the warehouse on this platform. Plaintiff's baggage had been previously stored there, and he had gotten on and off the train there. Shortly before arrival of the next train, defendant's agent sent his clerk with plaintiff to this warehouse for the purpose of rechecking the trunks to Elm City. After rechecking the trunks, plaintiff started to take the approaching train. It was at night; there was no light on the platform, and it was incumbered with cotton. Plaintiff stepped into a hole in the platform, and was injured. Plaintiff had a mileage book on defendant's road.

If these facts are true plaintiff was a passenger when injured. He had a right to seek his baggage and recheck it. It matters not whether Sharpsburg was a regular or a flag station, the defendant owed plaintiff the duty to provide a safe platform, especially as plaintiff entered on it at invitation of defendant's agent for a legitimate purpose. *Daniel v. Railroad*, 117 N. C. 592, 23 S. E. 327. The duty of a railroad company in respect to keeping safe station premises extends to all who rightfully come upon the premises in pursuance of the invitation which it holds to the public, and embraces all who come there on legitimate business to be

†For the authorities in this series on the subject of the duties of a carrier of passengers with respect to the safety of stations, platforms, and other stopping places, see foot-note appended to *Murnahan v. Cincinnati, etc., Ry. Co.* (Ky.), 17 R. R. R. 667, 40 Am. & Eng. R. Cas., N. S., 667; foot-notes appended to *McCormick v. Detroit, etc., Ry. Co.* (Mich.), 17 R. R. R. 516, 40 Am. & Eng. R. Cas., N. S., 516; foot-notes appended to *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *West v. St. Louis S. W. Ry. Co.* (Mo.), 15 R. R. R. 855, 38 Am. & Eng. R. Cas., N. S., 855.

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transacted with its agent. Wood on Railways, pp. 310, 1341, 1349; *Beard v. Railroad*, 48 Vt. 101; 6 Cyc. 605, 610. There was, in our opinion, sufficient evidence of negligence to be submitted to the jury under appropriate issues.

It is contended that there is a variance between the allegations of the complaint and the proof. We do not think the alleged variance sufficient to justify a nonsuit. It may be well to amend the complaint, although we do not decide that it is insufficient as it is. The nonsuit is set aside.

New trial.

MOBILE LIGHT & R. CO. v. WALSH.

(Supreme Court of Alabama, April 3, 1906.)

[40 So. Rep. 560.]

Appeal—Harmless Error—Admission of Evidence.—In an action for personal injuries, error, if any, in admitting evidence as to a certain element of damage, was harmless, where plaintiff's counsel subsequently stated to the court and jury that all claims for such damages were abandoned.

Evidence—Opinions.—In an action for damages from personal injuries, evidence by a daughter of plaintiff to the effect that plaintiff was unable to do anything was not objectionable on the ground that the witness was not shown to be an expert.

Carriers—Personal Injuries—Alighting from Street Car—Evidence.*—In an action by a passenger for injuries sustained while alighting from a street car, which it was alleged was stopped at a dangerous place, evidence that there were a great number of other places in the city just as dangerous, and at which passengers were constantly alighting without injury, was not admissible.

Same—Stopping to Set Down Passengers—Care Required.†—A street railway company is required to exercise the highest degree of care in selecting a place at which to stop its cars to allow passengers to alight.

Same—Action for Injuries—Instructions.—In an action against a street railroad company for injuries to a passenger who fell while attempting to alight, an instruction that, when a car is stopped at or

*See extensive note 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

†For the authorities in this series on the question as to the degree of care required of a carrier of passengers, see foot-notes appended to *Latour v. Southern Ry. (S. Car.)*, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379; *Southern Ry. Co. v. Cunningham (Ga.)*, 18 R. R. R. 374, 41 Am. & Eng. R. Cas., N. S., 374; foot-notes appended to *Chicago Union Traction Co. v. Newmiller (Ill.)*, 18 R. R. R. 273, 41 Am. & Eng. R. Cas., N. S., 273; *Williams v. Spokane, etc., Ry. Co. (Wash.)*, 18 R. R. R. 278, 41 Am. & Eng. R. Cas., N. S., 278; foot-notes appended to *Normile v. Wheeling Traction Co. (W. Va.)*, 18 R. R. R. 235, 41 Am. & Eng. R. Cas., N. S., 235.

For the authorities in this series on the subject of the duties of a carrier of passengers with respect to the safety of stations, platforms,

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near the place where the passenger gives the signal for it to stop, this may be taken as an invitation to alight, was not objectionable as withdrawing from the jury the question whether or not stopping the car at the place where plaintiff was injured constituted an invitation to alight there.

Same—Misleading Instructions.—In an action against a street railroad company for injuries to a passenger, alleged to have been caused by negligence in stopping the car at a place where it was dangerous to alight, a requested instruction that plaintiff, having alleged that defendant negligently invited her to alight at the place of injury, could not recover without proving that defendant “did issue such invitation,” was misleading because of the quoted words.

Trial—Instructions—Ignoring Evidence.—In an action against a street railroad company for injuries to a passenger alleged to have been caused by negligence in stopping the car at a place where it was dangerous to alight, requested instructions that the mere stopping of the car was not an invitation to alight at the dangerous place until a reasonable time had elapsed in which to enable those in charge of the car to start it back to the proper place of exit, and that the stopping of the car at the improper place was not the proximate cause of the injury, unless application was made to the conductor to have the car returned to the proper place, erroneously ignored evidence that the plaintiff had made to the motorman a request, which was heard by the conductor, to take the car back to the proper place.

Carriers—Injury to Passenger—Place for Alighting—Safety—Rights of Passenger.‡—A passenger on a street car has a right to rely upon the assurance of safety implied from an invitation to alight from the car at a point where it was stopped after the passenger had signified his desire to alight.

Trial—Instructions—Assumption of Facts.—In an action by a passenger against a street railroad company for injuries alleged to have been caused by stopping the car at a dangerous place to allow a passenger to alight, a requested instruction that, where the condition of the track and the place of exit and the surrounding circumstances are fully known to both parties, the question of negligence on the part of the carrier in stopping at a given place is to be tested by the same consideration as the question of negligence on the part of the passenger in alighting at that place, was properly refused, because assuming that the condition at the place where plaintiff alighted was fully known to her.

Carriers—Injury to Passenger—Place for Alighting—Duties of Carrier and Passenger.‡—While the servants of a street railroad com-

and other stopping places, see foot-note appended to *Murnahan v. Cincinnati, etc., Ry. Co. (Ky.)*, 17 R. R. R. 667, 40 Am. & Eng. R. Cas., N. S., 667; foot-notes appended to *McCormick v. Detroit, etc., Ry. Co. (Mich.)*, 17 R. R. R. 516, 40 Am. & Eng. R. Cas., N. S., 516; *Abbott v. Oregon R. Co. (Ore.)*, 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *West v. St. Louis S. W. Ry. Co. (Mo.)*, 15 R. R. R. 855, 38 Am. & Eng. R. Cas., N. S., 855.

‡For the authorities in this series on the subject of the right of a passenger to assume that the carrier has performed the duties owing to passengers, see foot-notes appended to *Chesapeake & O. Ry. v. Harris (Va.)*, 18 R. R. R. 139, 41 Am. & Eng. R. Cas., N. S., 139.

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pany are charged with the duty of knowing whether a place at which a car is stopped to allow passengers to alight is reasonably safe, the passenger is charged with no such duty, and is not negligent in alighting at such place, unless the danger is obvious.

Trial—Instructions—Argumentativeness.—In an action against a carrier for injuries to a passenger, a requested instruction that there was no evidence tending to show any negligence on the part of the motorman which was the proximate cause of plaintiff's injury stated no principal of law, and was argumentative, and was properly refused.

Same—Emphasizing Certain Facts.—A charge which confines the consideration of the jury to certain facts, to the exclusion of others relative to the same issue and shown by the evidence, is misleading.

Carriers—Injury to Passenger—Alighting at Dangerous Place—Contributory Negligence.§—Where a street car is run past the place at which a passenger has signified his desire to alight, and stopped at an unusual and dangerous place, and the passenger in alighting there does no more than an ordinarily prudent person would have done under the circumstances, he is not guilty of contributory negligence.

Appeal from Circuit Court, Mobile County; Wm. S. Anderson, Judge.

"To be officially reported."

Action by Catherine Walsh against the Mobile Light & Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action by appellee against appellant to recover damages for personal injury to her as a passenger, under a complaint charging that while a passenger upon one of defendant's cars she had been injured by reason of the negligence of the defendant company in bringing its car to a stop at an improper and dangerous place of exit, and negligently inviting her to alight therefrom, wherefore she fell and suffered a fracture of her leg, permanently disabling her. The pleas were the general issue to both counts; and to the first count, "that the plaintiff saw the height of the step of the car from which she alighted above the ground before she attempted to alight, and, after seeing the height of the step above the ground, she negligently attempted to alight, and that her said negligence proximately contributed to the injury complained of;" and to the second count, "that the plaintiff, before alighting, saw the height of the step above the ground, and also saw the irregular conformation of the ground complained of, and nevertheless negligently alighted from the step of the car, and that her negligence in so alighting proximately contributed to the injuries complained of;" and to both counts, "that at the point where defendant car stopped it was safe for plaintiff to alight from said car on one side thereof, with

§For the authorities in this series on the question of the degree of care required of a passenger for his own protection, see *Normile v. Wheeling Traction Co.* (W. Va.), 18 R. R. R. 235, 41 Am. & Eng. R. Cas., N. S., 235.

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the assistance of the conductor upon said car, and when said car stopped said conductor invited plaintiff to alight on said safe side, and was ready to assist her in so alighting, of which plaintiff had notice, but that plaintiff negligently failed to alight on said side, and voluntarily alighted on the more dangerous side, and that her said negligence proximately contributed to the injuries complained of."

The evidence tended to show that plaintiff was a passenger on defendant's car, and requested to be put off at a certain crossing; that the car was run past this crossing some 50 or 100 feet, and stopped; that plaintiff asked the motorman to run the car back to the crossing, as the point at which it stopped was low and rough; that the car was not backed back, and in attempting to alight plaintiff received the injuries complained of. There was conflict in the testimony as to the distance between the step and the ground, as to the condition of the ground at that point, as to whether or not the conductor asked the plaintiff to get off on the other side of the car and offered to assist her to so alight, and as to whether or not there was an invitation to alight at that point.

The oral charge is set out in full in the transcript, to portions of which the defendant excepted as follows: "The law requires of a railroad carrying passengers—such a railroad as this—the highest degree of care in the operation of its cars to protect the lives and limbs of its passengers; that is, they are required to exercise the highest degree of care in providing places for passengers to alight from their cars, and a failure to exercise that degree of care is negligence upon the part of the defendant." And: "Where the car stopped at or near where the passenger gives the signal for it to stop, or has directed or requested it to stop, or where it is stopped just beyond such point a short distance, that may be taken as an invitation to alight." And: "If the car was brought to a standstill, and nothing more was done, that would properly be held to be an invitation from the servants of the defendant in charge of the car for the passengers to alight there."

The court gave the following charges at the request of the plaintiff: "(1) If the evidence shall reasonably satisfy the jury that the defendant carried Mrs. Walsh beyond the point where it had been requested to stop the car for her to alight, and stopped the car for her to leave it an unusual and improper place, where she left it and was hurt in doing so, and that in getting off at that place she did no more than an ordinarily careful prudent person would have done under like circumstances, then she was not guilty of contributory negligence." Charge 3: "The court charges the jury that if the defendant, by its employees, stopped its car for plaintiff to alight at a place where the step was so high from the ground that she could not alight without great danger of falling, such place was an improper one for such stop to have been made."

The defendant requested the following written charges, which were refused by the court: Charge B: "The court charges

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the jury that, the plaintiff in this case having alleged that the defendant negligently invited her to alight from the car upon which she was a passenger at the place of the injury, the plaintiff cannot recover without establishing to the reasonable satisfaction of the jury that the defendant did issue such an invitation; and the court charges the jury that the mere fact that a car is brought to a stop after having passed the proper stopping place, by reason of the failure of the conductor to ring the bell in time, does not, without more, constitute an invitation to passengers to alight at an improper place of exit; nor can such an invitation be implied from the mere stopping of the car until a reasonable time has elapsed in which to enable those in charge of the car to start the car back to the proper place of exit."

Charge C: "The court charges the jury that the mere negligent passing of the proper place of exit by an electric car, owing to the neglect of the conductor to give the signal for stopping soon enough to enable the motorman to stop the car at the proper place, does not constitute the proximate cause of an injury received by a passenger who attempts to get off of the car as soon as it is stopped and at an improper place, without first applying to the conductor to have the car returned to the proper place, and without giving the conductor an opportunity to do so."

Charge 5: "The court charges the jury that if they believe from the evidence that the plaintiff, Mrs. Catherine Walsh, saw the condition of the street, and the distance from the street to the step, before she undertook to alight, and, judging of the matter for herself, came to the conclusion that she could alight in safety, and voluntarily undertook to do so without the assistance of any person, and that her effort to so alight proximately contributed to her injury, then the jury should find for the defendant."

Charge 6: "The court charges the jury that if the condition of the street at the point of the injury was such as to make it negligence on the part of those in charge of the car to stop the car at such points, and if the jury further believe from the evidence that the plaintiff, before attempting to alight, saw and knew the surrounding conditions, and was in a position to judge for herself as to their safety, and nevertheless undertook to alight voluntarily without assistance, and in doing so fell and was injured, then the jury should find for the defendant."

Charge 7: "The court charges the jury that if the motorman, the conductor, and all the passengers on an electric car all see the surrounding condition, and have equal opportunities to judge of the safety of the passenger alighting at that place, then such conditions known to both parties, and which were so dangerous as to make it negligence on the part of those in charge of the electric car to stop at that place for the exit of passengers, would also be so dangerous as to make it contributory negligence on the part of the passenger to voluntarily attempt to alight at such place without assistance."

Charge 10: "The court charges the jury that if they believe from the evidence that plaintiff saw the surrounding con-

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ditions, and calculated the distance for herself, and concluded that she could step down in safety, and voluntarily undertook to do so, but miscalculated the distance, and that it was this fact that caused her to fall and be injured, then the jury should find for the defendant." Charge 14: "If a person of ordinary prudence, seeing what plaintiff saw, would have doubted whether it was safe for her to alight where the car stopped, the jury ought to find a verdict for the defendant." Charge EE: "The court charges the jury that there is no evidence in this case tending to show any negligence on the part of the motorman which was the proximate cause of plaintiff's injury." Charge E: "The court charges the jury that if they believe from the evidence that the conductor in this case got upon the ground to assist the plaintiff to alight from the car, and that the plaintiff saw that he had done so, and nevertheless undertook to alight from the car on the other side without any assistance, and if the jury believe from the evidence that the plaintiff could have alighted from the car with the assistance of the conductor without any injury to herself, then the jury should find for the defendant." Charge I: "The court charges the jury that neither the failure of the car to stop at Lafayette street after the conductor had been warned of plaintiff's desire to leave the car at that point, nor the fact that the car stopped shortly after running by said street at an improper place for exit of passengers, nor both of these facts taken together, could without more, render the defendant liable for an injury the passenger received in leaving the car, by reason of the condition of the ground at the point where the car stopped, unless there was something further which justified the passenger in concluding that it was not the intention of those in charge of the car to back the car to the proper place of exit, for the purpose of letting the plaintiff out." Charge J: "The court charges the jury that, if the conductor in charge of the car neglects to give the motorman the signal in time to enable the motorman to stop the car at a street crossing at which the conductor has been informed by a passenger that she desires to alight, it is the duty of those in charge of the car to have the car backed to the street crossing at which the passenger desires to alight, and the conductor is entitled to a reasonable time within which to perform this duty, and if, under these circumstances, a lady passenger tries to get off of the car without giving the conductor an opportunity to back the car to a proper place of exit, so that the conductor cannot start the car back while the lady is attempting to alight without increasing her jeopardy, then the railroad company is not liable for any injury the lady may suffer by reason of her efforts to get out of the car at the place where the car has stopped." Charge K: "The court charges the jury that, where the condition of the track and the place of exit and the surrounding circumstances are fully known to both parties, then the question as to whether it is negligence on the part of the street railroad company to stop its cars at a

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given place for the purpose of affording an exit to its passengers is to be tested by indentially the same consideration as the first one, whether it is negligence on the part of the passenger to attempt to alight at that place." Charge M: "The court charges the jury that if the plaintiff notified the conductor of her desire to alight at Lafayette street, and the car was unintentionally run past that street by reason of the failure of the conductor to notify the motorman in time to enable him to stop the car at that point, and if the place at which the car did stop was an improper place for putting passengers out, then it was the duty of the conductor to back the car to a proper place of exit, and he was entitled to a reasonable time within which to correct the error; and if the plaintiff voluntarily, and without the conductor or motorman having notified her to do so, left the car without according the conductor an opportunity of correcting his error, and fell and was injured, she is not entitled to recover."

There was judgment for the plaintiff for \$2,000.

Gregory L. & H. T. Smith, for appellant.

R. H. & N. R. Clarke and *Leo M. Brown*, for appellee.

TYSON, J. The affirmative charge requested by the defendant was properly refused. *Mobile Light & Railroad Co. v. Patrick Walsh* (Ala.) 40 South. 559.

While damages are claimed in the complaint for the pain occasioned the plaintiff by the alleged rough operation of the car while being transported from the place of her injury to the point where she finally left it, and testimony tending to support this allegation was offered against the objection of defendant, yet, in view of the statement of plaintiff's counsel, made to the court and jury, that she abandoned all claim for such damages, if error was committed by the court in permitting the introduction of this testimony, it was without injury. *Sou. Ry. Co. v. Bunt*, 131 Ala. 591, 32 South. 507; *Strawbridge v. Spann*, 8 Ala. 820.

The motion to exclude the statement of Mrs. Brown that "her mother [the plaintiff] was unable to attend to her duties and is still unable to do anything," because the witness was not shown to be an expert was properly overruled. *S. & N. Ala. R. R. Co. v. McLendon*, 63 Ala. 266, 276 and cases there cited; *L. & N. R. R. Co. v. Stewart* 128 Ala. 313, 29 South. 562.

Objections to the several questions propounded by defendant to its roadmaster, for the purpose of showing that there was at the time, and had been for a long time, a great number of other places in the streets of the city, over which its tracks ran, where there was just as great depressions, and even lower than the one where the accident to plaintiff occurred; that those conditions had existed for a number of years, and that passengers, male and female, in great numbers, were constantly in the habit of getting off the cars at such places without injury or difficulty, were properly sustained. The object sought by the questions was to show that the place at which plaintiff was hurt was not dangerous. To

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permit this character of testimony to be introduced would inject into the case an interminable number of issues upon purely collateral matters and perhaps divert the minds of the jurors from the main issues. *Commander v. State*, 60 Ala. 1; *McAnally v. State*, 74 Ala. 9; *Mattison v. State*, 55 Ala. 224; *Montgomery St. Ry. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Association v. Giles*, 33 N. J. Law, 260; *Branch v. Libbey*, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810; *Langworthy v. Green Township*, 88 Mich. 207, 50 N. W. 130; *Kidder v. Dunstable*, 11 Gray (Mass.) 342; 1 Greenleaf on Ev. (16th Ed.) §§ 14a, 52, 448. The case decided by this court and relied upon by appellant as supporting his contention on this point do not go further than to hold that testimony that other persons alighting from defendant's cars at the place where the injury occurred, if conditions were shown to be the same as when the accident to plaintiff happened, was admissible. *E. Tenn., Va. & Ga. R. R. Co. v. Thompson*, 94 Ala. 636, 10 South. 280; *Birmingham Ry. & Elec. Co. v. Alexander*, 93 Ala. 137, 9 South. 525; *Mayor & Aldermen of Birmingham v. Starr*, 112 Ala. 98, 20 South. 424; *Davis v. Alexander City*, 137 Ala. 206, 33 South. 863. We are unwilling to extend the rule declared in those cases to the length we are here asked to go. Indeed, we think they have gone to the full limit—much further than the courts in other states have gone.

Several exceptions were reserved to certain parts of the oral charge of the court, which it set out in extenso in the record. The first of these relate to the degree of care exacted by the law of street car companies operating their cars by electricity with respect to their operation and as to places for their passengers to alight. The court instructed the jury that such railroad companies were required to exercise the highest degree of care, both as to the operation of the cars and providing places for the discharge of their passengers from their cars. Such is the law when applied to the facts of this case, as declared by this court in *Montgomery St. Ry. v. Mason*, 133 Ala. 508, 32 South. 261. See, also, 2 *Shearman & Redfield on the Law of Negligence*, §§ 495, 509; *Nellis on St. Ry. Accident Law*, p. 109. For it will scarcely be denied that the stopping of the car for passengers to alight from it is in a sense providing a place for such passenger to alight.

The next is to this language employed by the court: "When the car is stopped at or near the place when the passenger gives the signal for it to stop, or has directed or requested it to stop—that is, when the car stops just beyond such point a short distance—that may be taken as an invitation to alight." This seems to announce a correct principle. *Nellis on St. Ry. Accident Law*, pp. 110, 111, and note 60 on latter page. But we do not understand this instruction, as is contended, as withdrawing from the jury the question whether on the facts stated there may or may not have been an implied invitation to the passenger to alight. On the contrary, we think is quite clear, under the charge, that

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that question was left to them for their determination. As to the next portion of the charge excepted to, if conceded to be subject to criticism standing alone, the error, if one, was corrected by what was subsequently said by the court in its oral charge to the jury, in which it was distinctly and properly stated that the question whether there was an invitation to alight from the car was one for the jury. *R. & D. Ry. Co. v. Weemes*, 97 Ala. 270, 12 South. 186, and cases there cited; *Winter v. State*, 132 Ala. 32, 31 South. 717; *Sweeny v. Bienville Water S. Co.*, 121 Ala. 454, 25 South. 575.

Charges B and C, refused to the defendant, were each properly refused. The first of these was calculated to mislead the jury in the use of the expression contained in it, "that the defendant did issue such an invitation," and, besides, it ignored that phase of the testimony from which the jury would have been authorized to find that there was a request by plaintiff to the motorman to take the car back to the crossing, and that the request was heard by the conductor. The last criticism also applies to charge C. Other objections to them might be pointed out, but these will suffice.

Charge 5 ignores the principle that plaintiff has a right to rely upon the implied assurance of safety arising out of an express or implied invitation to alight, even if doubtful as to such safety, and was justified in alighting if a person of ordinary care and prudence would have done so under the circumstances.

Charges 6 and K are treated together in brief of appellant's counsel as asserting substantially the same principle. We shall not go further than to point out the defect in the last one designated. It was clearly misleading, in that it assumes that the condition of the track, place of exit, and surrounding circumstances were fully known to the plaintiff, whereas the testimony tends to show that they were not fully known. Besides, the defendant's servants were charged with the duty of knowing whether the place was reasonably safe, and, if its unsafe condition could have been discovered by them by the exercise of that degree of care required, they must be charged with the knowledge of that condition. No such duty was imposed upon plaintiff, and she could not be held to be guilty of negligence as matter of law, unless the place where she alighted was obviously dangerous. *Nellis on St. Ry. Accident Law*, p. 118. This principle is also conclusive against the correctness of charge 7.

Charges 10 and 14, from what we have said, were each correctly refused.

There was no evidence tending to show that plaintiff's fall was occasioned by her foot having caught in her skirt. Charge D was, therefore, properly refused.

The court cannot be reversed for refusing charge EE. It asserts no principle of law, and must be condemned as being argumentative. If it was the purpose to have the jury instructed that under the evidence the motorman was not guilty of negligence,

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the proposition should have been requested in a way to properly raise that question.

Charge F wholly ignores all reference to notice or knowledge on the part of the plaintiff that it was dangerous to alight from the car on the side that she did, instead of the other.

Charge I confines the consideration of the jury to certain facts therein stated, to the exclusion of others shown by the testimony relevant to the issue, and was therefore misleading. For the same reason charges J and M were properly refused.

The two charges given at plaintiff's request, assigned as error, each assert correct propositions of law, and there was no error in giving them.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

UNION PAC. R. CO. v. THOMPSON *et al.*

(Supreme Court of Nebraska, Jan. 3, 1906.)

[106 N. W. Rep. 598.]

Carriers—Live Stock Shipments—Delay.—Evidence examined, and held sufficient to submit to the jury the question of negligent delay in the operation of a stock train.

Depositions—Motion to Suppress.—An action was pending in the county court, and the plaintiff served notice of taking depositions, but by mistake the notice referred to the action as pending in the district court. The depositions were returned by the notary to the clerk of the district court, and filed in that court. On the trial of the case in the county court, the depositions were by agreement of the parties taken from the office of the clerk of the district court and read upon the trial. The defendant appealed the case to the district court, and there moved to suppress the depositions because not properly certified, and because there was no action pending in the district court when the same were taken and returned to that court. Held, that the district court did not err in overruling the motion and allowing the depositions to be read.

Carriers—Freight—Claims for Loss.*—A stock shipping contract contained a provision to the effect that unless claims for loss, damage, or detention are presented within 10 days from the date of unloading the stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Held, upon the authority of *M. P. Ry. Co. v. Vandeventer*, 41 N. W. 998, 26 Neb. 222, 3 L. R. A. 129, that such provision was void and ineffective under the laws of this state.

Trial—Reception of Evidence—Exclusion by Instructions.—Where

*See foot-notes appended to *Chicago, B. & Q. R. Co. v. Hammond* (Ill.), 12 R. R. R. 561, 35 Am. & Eng. R. Cas., N. S., 561.

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evidence is taken without objection on a question not put in issue by the pleadings, the admission of the evidence makes it an issue, and the court cannot exclude it by an instruction after the parties have rested, nor can the party on appeal urge that it was not an issue in the case.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Error to District Court, Custer County; Hostetler, Judge.

Action by Silas Thompson and Tierney Bros. against the Union Pacific Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John N. Baldwin, Edson Rich, John A. Sheean, and A. R. Humphrey, for plaintiff in error.

H. M. Sullivan, for defendants in error.

DUFFIE, C. In their petition filed in the district court, Thompson and Tierney allege that they delivered certain stock to the Union Pacific Railroad Company at Octonto, Custer county, Neb., for shipment to South Omaha; that the stock was delivered to the defendant company at 2 o'clock in the afternoon of March 24, 1903, and that it was careless and negligent in not transporting and delivering said stock at South Omaha by 2 o'clock in the morning of the 25th of March, 1903; that defendant carelessly and negligently kept the said stock in the cars and on the road until 6 o'clock in the evening of the 25th of March; that the stock did not reach South Omaha until after the market had closed on the 25th, and plaintiffs were compelled to keep the stock over and to sell the same on the 26th at 15 cents per hundred less than they would have brought on the 25th, in consequence of a decline in the market. A claim is also made for shrinkage of the stock and for damages to one cow that got down and was crippled from being trampled on by other stock, all of which, it is claimed, occurred in consequence of defendant's negligence. The answer was a general denial—an allegation that the train was run with all reasonable speed, and that such delays as occurred were in consequence of being laid out for other trains which had the right of way, and of putting a new brass in a box which had become heated. It was further alleged that the shippers accompanied the stock for the purpose of caring for the same, and were furnished with free transportation for that purpose. As a further defense, it is alleged that, at the time the contract of shipment was made, and in consideration of reduced freight charges and other considerations set forth in the contract, the following condition was expressly agreed to and incorporated therein, viz.: "Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination and before said stock has been mingled with other stock, such claims shall be deemed to be waived and the carriers and each thereof shall be discharged from liability." No reply was

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filed to this answer, but a trial was had upon the theory that a reply in the form of a general denial had been interposed. The jury returned a verdict in favor of the plaintiffs for \$100, upon which judgment was entered, and the company has taken error to this court.

A motion was made to suppress depositions taken by the plaintiffs, upon the ground that they were taken before the action was pending in the district court, and that they were not addressed to the clerk of the court in which the action was pending, and that they did not remain under seal until opened by the clerk of the court to which they were addressed, and for the further reason that they were not properly certified. The case was originally tried in the county court, where the depositions of Walter E. Wood and Bruce McColloch were offered in evidence and read. These depositions were taken in South Omaha on notice given by the plaintiffs; the notice stating that they were to be used on the trial of a case pending in the district court of Custer County. It appears from the record that the depositions were returned and filed with the clerk of the district court of Custer county; that previous to the trial in the county court the attorney for the plaintiffs, on being informed of this fact, stated to counsel for the defendant that he would have to ask for a continuance unless he would consent to the use of the depositions in the county court, and that thereupon it was agreed that the depositions might be used, and they were used, in the county court, and upon appeal to the district court they were transferred with other papers in the case. Counsel who appeared for the defendant company in the county court, and who was also one of the counsel appearing in the district court, testified as follows: "I think in a general way I agreed that the depositions could be read in the county court." Upon this showing the motion to suppress was overruled, and the depositions were used on the trial in the district court. The district court was clearly right in overruling the motion to suppress the depositions. While the case in which they were taken was pending in the county court and the notice served upon the defendant recited that they were to be filed and used in a case pending in the district court, no prejudice to the defendant resulted from such error. Defendant was represented by counsel, who cross-examined the witnesses at the taking of the depositions. This might not, perhaps, have cured the error in the notice, or have given the plaintiffs a right to take depositions on file in the district court for use in the county court in the absence of an agreement, but it clearly appears that such agreement was made, and the defendant company cannot now insist upon irregularities or objections to the depositions which might have been interposed in the absence of such agreement.

It is objected that there is not sufficient evidence to sustain a finding that the defendant company was negligent in operating the train upon which the plaintiff's stock was shipped, or in failing to use due diligence in avoiding delays in reaching South

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Omaha. We do not care to review the evidence on this question. Between Kearney and South Omaha the train was sidetracked on numerous occasions, and delays extending from 25 minutes to 2 hours occurred on several occasions. The evidence of the conductor and engineer in charge was taken as to the causes of these delays. Several stops were occasioned by waiting for other regular trains which had the right of way over the train in question. As to these stops the engineer and conductor could properly testify, for the reason that the time card would show the time and place where such trains would pass, but numerous extra trains were upon the road, and many delays were occasioned by the passage of these extras. Orders from the train dispatcher would be necessary in such cases, and the evidence of the train dispatcher as to the necessity of these stops and their duration would be the best and most reliable evidence on the part of the company. His evidence was not offered, and no attempt to show the necessity of the delay except by the trainmen was made on behalf of the company. On the whole, we believe that there was sufficient evidence to submit to the jury the question of negligence on the part of the company in not operating its train with sufficient diligence. The evidence offered on behalf of the plaintiff tended to show that because of the great length of time the cattle were on the road they were in bad condition, some of them bruised and having the general appearance of cattle that had been in the cars a long time, and that on this account their selling price was depreciated about 10 cents per hundred. This evidence came from Walter E. Wood, a salesman in the stockyards. Objection is now made that the petition did not claim damages for the bruised or worn condition of the stock, and that that was not an issue in the case. It is sufficient to say, in relation to this, that no such objection to the evidence was made on the examination of the witness, or at the time his deposition was offered in evidence. It is familiar law that where evidence is taken without objection on a question not put in issue by the pleadings, the admission of the evidence makes it an issue, and the court cannot exclude it by an instruction, nor can the party on appeal urge that it was not an issue in the case. *Collins v. Collins*, 46 Iowa, 60; *Wilson Sewing Machine Co. v. Bull*, 52 Iowa, 554, 3 N. W. 564.

The defendant company tendered the following instruction, based upon the clause of the shipping contract above referred to: "You are instructed that the evidence shows conclusively that no claim was made to the agents or officers of the defendant company prior to the mingling of the stock in question with other stock, and you will therefore find for the defendant." The court refused this instruction, and error is predicated thereon. We will again repeat the clause of the contract under which it is claimed this instruction was brought: "Unless claims for loss, damage or detention are presented within ten days from the time of the unloading of said stock at destination and before said stock has been mingled with other stock, such claims shall be deemed to be

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waived and the carriers and each thereof shall be discharged from liability." Section 4 of article 11 of our Constitution provides that "the liability of railroad corporations as common carriers shall not be limited." The district court undoubtedly took the view that this clause of the contract was an attempt to limit the common-law liability of the carrier. It is not an open question in this state that common carriers cannot, by contract, limit their common-law liability. If the question had not been foreclosed by a prior decision, we would incline to the holding that the clause above quoted does not encroach upon this rule. There is no attempt, in our judgment, to limit the common-law liability of the carrier for damage sustained in consequence of its negligence. The carrier, by this clause, attempts to protect itself from fraud and imposition by being notified of any claim for damages which the shipper may have before the stock is mingled with other stock, in order that it may be inspected and evidence of its condition secured. It recognizes the liability of the carrier, but provides for prompt notice.

In *Sprague v. Mo. Pac. Ry. Co.*, 34 Kan. 347, 8 Pac. 465, a similar contract was enforced, and held not to be an attempt to relieve the carrier of any of its common-law obligations or liability, and, referring to the case of *Goggin v. K. P. Ry. Co.*, 12 Kan. 416, the court said: "It was there, as here, urged in support of the reasonableness and justice of the regulation that the defendant was, at the time of the alleged injury, engaged in transporting great numbers of cattle and horses over its line of road and which were being shipped to different points thereon, and that it would have been impossible for it to have distinguished one carload from another unless its attention was called immediately thereto, and that the object of the notice and demand mentioned in the contract was to relieve it from any false or vicious claim, and to give it an opportunity to have an inspection of the stock before they were removed or mingled with others, and the company could thus have an opportunity to ascertain and allow the actual damage suffered. These reasons are said to be cogent, and the agreement is there held to be reasonable, just, and valid. The decision in that case governs the one at bar, and the view which we have taken of the validity of this limitation agrees with the decisions of other courts, among which the following may be cited: *Rice v. K. P. Ry. Co.*, 63 Mo. 314; *Oxley v. St. Louis, etc., Ry. Co.*, 65 Mo. 629; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Dawson v. St. Louis, etc., Ry. Co.*, 76 Mo. 514; *Texas Central Ry. Co. v. Morris*, 16 Am. & Eng. R. Cas. 259, and cases there cited." To the same effect are *W. & W. Ry. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013, and *Kalina & Cizek v. N. P. Ry. Co. (Kan.)* 76 Pac. 438. In the case last cited it was held: "Where the shipping contract contains a lawful provision requiring the shipper to do something as a condition precedent to recovery, then the burden of showing the performance of said condition rests upon the ship-

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per, and, if he fails to show performance, he must fail of recovery." Our own court has apparently taken a different view of this class of contracts. In *M. P. Ry. Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129, the following clause of a contract was under consideration: "And for the consideration before mentioned said party of the second part further agrees that as a condition precedent to his right to recover any damage for any loss or injury to said stock he will give notice in writing of his claim therefor to some officer of the party of the first part or its nearest station agent before said stock is removed from the place of destination above mentioned or from the place of delivery of the same to said party of the second part and before said stock is mingled with other stock."

As we understand from the reading of the case, the district court instructed the jury relating to said clause of the contract as follows: "(2) The jury are instructed that the contract in writing discloses that it is in consideration of a special rate, and if the jury believe from the evidence that the stock was not shipped on a special rate, but that plaintiff paid the full regular rate of such service, then the special reservations, exceptions, or limitations sought to be availed of by defendant are without consideration, and the plaintiffs are not bound by the same where they restrict or limit the liability of defendant as a common carrier." Relating to this instruction the court said: "No. 2 in my opinion goes too far in favor of the plaintiff in error, as it seems to imply that, had the property been shipped at a special rate below the regular rate, the plaintiff in error could have availed himself of the special contract to avoid its liability as a common carrier, which, as I understand the effect of the constitutional provision, it could not do." Speaking further of this contract the court said: "As to the sixth clause of the shipping contract set forth herein and specially invoked by the plaintiff in error, if it were conceded that that clause was binding upon the defendant in error there is an entire want of evidence to bring the case within its provisions. Kansas City was the place of destination of the property within its meaning. The shipper agreed, as a condition precedent to his right to recover damages for any loss or injury to stock, to give notice in writing of his claim therefor to some officer of the party of the first part, or its nearest station agent, before said stock should be removed from its place of destination above mentioned or from the place of delivery of the same to the party of the second part, and before such stock is mingled with other stock, and there is an entire lack of evidence, as shown by the bill of exceptions, of the removal of the stock from Kansas City, or of its having been mingled with other stock." This clearly indicates that the court regarded contracts of the kind under consideration as violative of our constitutional provision, and also, that the burden was upon the defendant instead of the plaintiff to show that the notice provided was not given. We feel bound by this decision which has been the rule in this state

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since 1889, and hold, therefore, that the court properly refused the instruction asked.

The court, in its fourteenth instruction, told the jury in plain terms that where the shipper agrees, as in this case, to personally accompany and care for his live stock transported by the railway company and is given free transportation for that purpose, he cannot complain of any injury arising from his own fault in caring for the stock. The evidence is clear that no complaint was made to those in charge of the train that the cow above spoken of was down, nor was any request made of those in charge of the train to assist in helping her up. It is quite clear, therefore, that the jury could not have taken into consideration the damage to this cow in arriving at its verdict. The evidence relating to damages from shrinkage and from the generally bad condition of the stock fully justifies the amount of the verdict, and we recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

BALTIMORE & O. R. Co. v. DOYLE.

(Circuit Court of Appeals, Third Circuit, January 15, 1906.)

[142 Fed. Rep. 669.]

Carriers—Limitation of Liability—Condition in Bill of Lading.*—

A common carrier cannot relieve itself from any portion of its common-law liability for the loss or destruction of goods in shipment, except by express or implied contract with the shipper, and in the absence of an express agreement no contract to that end will be implied from any condition or regulation contained in a bill of lading not within the general knowledge of the shipper, unless clearly and distinctly brought to his attention at the time of the shipment. There is no presumption, either of law or fact, that he had knowledge of such condition, where there is nothing in its position or the color or style of type in which it is printed to render it conspicuous, and the question of actual knowledge in such case is one of fact for the jury.

Same—Construction of Bill of Lading.—Any reasonable doubt as to the proper construction of the printed portion of a bill of lading should be resolved against the carrier which prepared it.

Same.*—Whether or not a shipper was negligent in failing to read

*See foot-notes appended to *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88; foot-notes appended to *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; *Patrick v. Missouri, etc., Ry. Co.* (Ind. App.), 16 R. R. R. 554, 39 Am. & Eng. R. Cas., N. S., 554; *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 15 R. R. R. 744, 38 Am. & Eng. R. Cas., N. S., 744.

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a condition printed on the back of a bill of lading limiting the valuation of the property in case of loss is immaterial on an issue as to whether he was bound thereby, which depends entirely on whether he assented to the condition.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 126 Fed. 841.

John S. Wendt, for plaintiff in error.

E. W. Smith, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The Baltimore & Ohio Railroad Company by this writ of error seeks to secure the reversal of a judgment recovered against it in the Circuit Court of the United States for the Western District of Pennsylvania, by William Doyle for damages for the alleged destruction, through the negligence of the railroad company, of household goods, including supplies, shipped by his wife, on his account and as his agent, from the city of New York to Glenwood, Pennsylvania. Judgment on verdict was entered December 30, 1903, in the sum of \$2,047.68, after a question reserved by the court had been decided adversely to the railroad company. It appears from the record and is not disputed that the shipment was made October 30, 1902, in 104 packages of the aggregate weight of 4,650 pounds; that the freight to Glenwood, amounting to \$20.93, was prepaid; and that the bill of lading when delivered by the railroad company to Mrs. Doyle contained the words "Released to a valuation of \$5 per 100 lbs." stamped upon its face in red ink beneath and next to the words and figures "Household Goods 4,650." At a valuation of \$5 per 100 pounds the total value of the shipment would have been \$232.50. The sum of \$2,047.68 represented the actual loss or damage to the shipment as found by the jury. The third paragraph of the "uniform bill of lading conditions" printed on the back of the bill of lading contains, among others the following regulations:

"The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

It appears from the evidence and is not disputed that the value of the goods shipped, as determined by the official classification of the railroad company upon which the rate or charge for carriage was based, was \$5 per 100 pounds; that such rate or charge was 45 cents per 100 pounds, amounting to \$20.93 for the total shipment of 4,650 pounds; and that this sum was paid by Mrs.

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Doyle as freight to the proper agent of the railroad company immediately before receiving from him the stamped bill of lading. If Mrs. Doyle in shipping the goods agreed either expressly or impliedly with the railroad company that they should be carried upon the basis of a limitation of liability, in case of loss or damage, to \$5 per 100 pounds, the plaintiff was bound by such agreement, and could not legitimately recover, aside from interest and costs, more than \$232.50. If, however, she did not expressly or impliedly so agree, or agree to any other limitation with respect to value, the plaintiff was not limited in his recovery to that sum, or any other sum based upon weight of shipment, but was entitled to recover the full amount of actual loss or damage. There is uncontradicted evidence to the effect that Mrs. Doyle had no actual knowledge or notice at the time of shipping the goods, or before the next following day, of the regulation on the back of the bill of lading limiting valuation in case of loss or damage, or of the memorandum stamped in red ink on its face—"Released to a valuation of \$5 per 100 lbs."; that she did not at any time in fact agree to such or any restricted or limited valuation of the goods; that she had no intention or idea that they should or were to be accepted for carriage or carrier by the railroad company on such a basis; that neither the bill of lading nor the shipping order, as handed in to the agent of the railroad company, contained such a memorandum; and that when the former was delivered to Mrs. Doyle, stamped as described, together with her change after payment of the freight, she noticed that it was "stamped paid," and put it in her purse, without examining it, and did not look at it again on that day.

The second, third and fourth assignments of error are to the refusal of the court below to charge the jury as follows:

"First. That the bill of lading in evidence in this case, 'Plaintiff's Exhibit No. 1,' constitutes a contract between the plaintiff and defendant for the transportation and delivery of the goods mentioned therein, to the consignee, upon the terms specified in said bill of lading, and in so far as it contains terms and conditions, fixing and determining the liability of the defendant in case of loss or damage to the goods shipped or mentioned therein, it stands on the footing of all other contracts in writing and cannot be contradicted or varied by parol evidence. Second. That it appearing in this case by the uncontradicted evidence of the plaintiff's wife, that at the time the goods were shipped, she, as agent for the plaintiff, delivered the goods mentioned in the bill of lading to the defendant and accepted, without objection, the said bill of lading, 'Plaintiff's Exhibit No. 1,' from the defendant company's agent at the time of the delivery of the goods for shipment; that such acceptance of said bill of lading is sufficient to show the assent of the plaintiff to the terms set out in the bill of lading [as] to the liability of the defendant company in this case, and therefore the liability of the defendant company in this case is defined by, and depends solely upon, the terms of the bill of lading.

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Third. That under all the evidence in this case the defendant company is not liable for more than \$5.00 for each hundred pounds in weight of the goods mentioned and described in the bill of lading, namely, \$232.50."

If Mrs. Doyle, in the shipment of the goods, was not chargeable in law with knowledge or notice of the regulation on the back of the bill of lading limiting valuation in case of loss or damage, the requested instructions above quoted clearly were improper, as being based upon the assumption, as facts, of matters properly determinable only by the jury. The first tacitly assumes that the bill of lading, as stamped in red ink and delivered to Mrs. Doyle at the time of shipment, was assented to by her as constituting the contract of carriage, with knowledge on her part of its terms and conditions relating to liability in case of loss or damage. The second in like manner assumes that the acceptance by her, without objection, of the bill of lading from the railroad company, was also with knowledge on her part of such terms and conditions. And the third likewise involves an assumption of such knowledge on her part at the time or on the day of shipment. Unless such knowledge was imputable by law to her, the matters of fact thus assumed in the above instructions were properly left by the learned Circuit Judge for determination by the jury. The railroad company certainly has no just cause of complaint with respect to the charge in this particular. That portion of the charge could not without error have been more favorable to it. On this branch of the case the court charged as follows:

"The plaintiff, William Doyle, at the time of this shipment was in the city of Pittsburgh. His business had brought him there. He left his wife and family in the city of New York, and she, the evidence shows, attended to this shipment. She was his representative there and whatever she agreed to in respect to this shipment would be binding upon the plaintiff. What did she agree to? If she agreed to a valuation of this property,—that is to say, if she agreed that for the purpose of this shipment the property should be considered, esteemed, regarded, treated, as of a value of \$5.00 per hundred pounds,—if she agreed to that, the plaintiff would be bound by that. Did she agree to it? Under all the evidence, that is the question of fact which I propose to submit to you. That, you will perceive, embraces much more than is in the bill of lading itself. It takes in all the testimony that has been delivered in your presence and hearing, embraces all the evidence, and I propose to submit to you as a question of fact whether Mrs. Doyle agreed to a valuation.
* * * I charge you that if Mrs. Doyle agreed to the alleged valuation claimed by the railroad company, \$5.00 per one hundred pounds, if she agreed to that, her husband is bound by the agreement; and if you find that she so agreed, your verdict would be limited to \$5.00 per one hundred pounds, and the sum would be \$232.50. I further charge you that if Mrs. Doyle's attention was drawn to the regulation printed on the back of this bill of lading

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limiting the liability of the carrier to an agreed valuation or classification,—if her attention was called to that regulation or she noted it and accepted this bill of lading, as a legal consequence that valuation or rate fixed by the classification would stand here. If her attention was called to the regulation or she saw it and accepted this bill of lading, that would make the contract binding upon her husband. But whether she did or not is for you to say under the evidence. And I further charge you that if Mrs. Doyle saw on the face of this bill of lading the stamped memorandum: 'Released to a valuation of \$5.00 per one hundred pounds,' and she accepted the bill of lading, that would amount to a binding contract fixing the valuation and her husband would be bound. But whether she did agree to it, whether her attention was called to it or she saw the regulation on the back of this bill of lading, or whether she saw the memorandum stamped upon the face of it and took the bill of lading with that knowledge, are questions of fact to be determined by you upon the evidence. If you should resolve these questions or any of them as I have last enumerated them to you in favor of the defendant company, your verdict ought to be restricted to \$5.00 per one hundred pounds of this shipment, \$232.50 in the whole. But if you find that she entered into no agreement for the valuation of this property limiting the liability of the railroad company, and that her attention was not called to the regulation on the back of the bill of lading, and she didn't see the stamp on the face of it—the memorandum stamp—then you would take up the question of the actual value of these goods."

Without undertaking to lay down any universal or unbending rule on the subject of the imputability in law of knowledge of the contents of written instruments, the evidence fails to satisfy us that Mrs. Doyle was chargeable either in law or in fact with knowledge of the regulation on the back of the bill of lading limiting valuation and consequently liability in case of loss or damage. A common carrier can not relieve himself from any portion of his common-law liability for the loss or destruction of property carried by him, unless by express or implied contract with the shipper. And in the absence of an express agreement limiting the carrier's liability, no contract to that end will or should be implied from any condition or regulation, contained in a bill of lading, not within the general knowledge of the shipper nor clearly and distinctly brought to his attention at the time of the shipment. We are not to be understood as holding that in all cases and under all circumstances the carrier is bound to give to the shipper, aside from the printed or written condition or regulation limiting liability, positive and actual notice of its presence in the bill of lading. Such condition or regulation, or an express reference to it, might be so conspicuous by reason of position, size and style of type and color of letters, or in other respects, as to produce conviction amounting to moral certainty that, unless through wilful disregard, it could not escape the

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attention of, or fail to be understood by, any shipper of sound mind and able to read and comprehend the English language. Such a case might afford a violent presumption of fact that the shipper had in mind such condition or regulation and, in the absence of objection on his part agreed or assented that the property should be carried subject to it. But certainly, save under very exceptional circumstances, before a shipper can be bound by a condition or regulation in the bill of lading limiting liability, of which he has not actual knowledge, it must positively and particularly be brought to his attention. *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 278, 18 Sup. Ct. 588, 42 L. Ed. 1033. The general rule on this subject as recognized by the Supreme Court, is stated in the latter case by Mr. Justice Brown, who, after citing sundry authorities, said:

"In this last case the rule obtaining in this court is adopted to its full extent by the Supreme Judicial Court of Massachusetts. In these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

Whether or not in a given case actual knowledge of the condition or regulation exists on the part of the shipper is a question for the jury; and here that question by the verdict was answered in the negative. The original bill of lading is before us, and we do not think that, aside from the memorandum limiting valuation stamped upon its face, of which according to the evidence Mrs. Doyle had no knowledge or notice on the day of shipment, it is of such character or appearance as, under the most authoritative decisions, to require that knowledge of the regulation on its back limiting liability should as matter of law be imputed to her. The regulation as printed is by no means conspicuous or otherwise calculated to arrest attention. It is preceded as well as followed in the same paragraph by other provisions in the same type, and the conditions embrace eleven paragraphs containing in the aggregate a large amount of reading matter. Further, there is no unequivocal statement on the face of the bill of lading of an agreement that the goods should be carried subject to all the conditions printed on its back, but only to those "whether printed or written, herein contained." It is true that next following the language last quoted is the parenthetical direction or notice "(see conditions on back hereof)," but is it questionable on a strict construction—and to such a construction the plaintiff is entitled—whether conditions

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"herein contained" would extend to conditions printed on the back of the bill of lading, or be restricted to such as might be printed or written in the body of the contract. There certainly was no space on the back of the bill of lading for "written" conditions, as it was filled with such as were printed. Any reasonable doubt as to the proper interpretation of the contract should be resolved against the railroad company. It chose the language incorporated in the printed portions of the bill of lading. On the whole, we are satisfied that the second, third and fourth assignments of error are untenable.

The seventh assignment is to the refusal of the court to charge the jury as follows:

"That if, under all the circumstances of this case, a reasonably prudent person ought to have seen the stipulation stamped on the face of the bill of lading, or ought to have understood that there was a limitation of the liability of the defendant company under the terms of the bill of lading, that then the plaintiff was bound by the terms of the bill of lading."

Such an instruction would, we think, have been misleading and improper. The decision of this case does not turn on circumsppection or negligence on the part of Mrs. Doyle at the time of shipment, but on assent or the want of assent by her to the carriage of the goods under a limited valuation and liability. Without her assent express or implied the plaintiff would not be bound by such limitation; and the mere negligence of Mrs. Doyle, if she was negligent, would not supply or manifest such assent.

But little need be said touching the remaining assignments of error. The first is to the admission of evidence, which clearly was relevant and material on the question of assent to limitation of liability. The sixth is to a portion of the charge included in the quotation we have hereinbefore made from it. We wholly fail to perceive how the railroad company justly can object to it. If there was any error,—and we do not say there was,—it was in favor of and not against the company. Nothing can be said in support of the fifth assignment. The eighth does not call for independent discussion, as the considerations germane to the disposition of the second, third and fourth assignments equally apply to it, and require that it should similarly be disposed of.

The judgment of the court below must be affirmed with costs, and it is so ordered.

BANKMAN *et al* v. PERE MARQUETTE R. CO.
(Supreme Court of Michigan, Dec. 4, 1905.)

[105 N. W. Rep. 154.]

Railroads—Injury to Shipper's Horses—Contributory Negligence of Owner.—Plaintiff drew a load of freight to defendant's depot, and at the direction of the baggageman, the regular place for unloading not being in condition for use, drove into the narrow space between the track and the freighthouse, and there unloaded, and then, leaving his horses unattended, went for his receipts; and was informed by the baggageman that he would have to wait till a train approaching on the other side of the depot was attended to, and after this had passed he again left his team and went indoors, and while holding a light for the baggageman to write he heard a train approaching on the track at the side of the horses, and sprang to their heads, but was unable to prevent their being struck. Held, that, in view of evidence that he was directed by the baggageman to leave the horses unattended where he did, it was not error to leave the question of his contributory negligence to the jury.

Error to Circuit Court, Van Buren County; John R. Carr, Judge.

Action by Gustave Bankman and another against the Pere Marquette Railroad Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

Argued before MOORE, C. J., and MCALVAY, MONTGOMERY, OSTRADER, and HOOKER, JJ.

F. W. Stevens (John C. Bills, of counsel), for appellant.
Barnard & Lewis, for appellees.

HOOKER, J. Plaintiff Gustave Bankman, one of two owners of a horse, sleigh, and harness, drew a load of freight to the defendant's depot at Grand Junction. Defendant's railroad passes the west side of the building, and at the point where freight is transferred there is a space barely wide enough to afford standing room for a team. The regular place for unloading freight is at the north end of the depot platform, and under ordinary circumstances no teams are allowed in this space. On the day of the accident the snow was so piled up as to prevent unloading upon the platform, and he was directed by defendant's baggageman to drive into the narrow space mentioned and unload at the freight-house door. He did so, and, leaving his team standing unattended, went into the office and secured his freight receipts. Then he went for his receipts, and was informed by the baggageman that he would have to wait until he attended to a Michigan Central train which was approaching on its track on the other side of the depot. After this train left the station plaintiff again left his team and went into the warehouse to wait for the re-

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ceipts, which the baggageman was writing while he held the lantern for him. Hearing a train approaching upon defendant's road, plaintiff sprang to his horses' heads, but the train was very close, and he was unable to lead them out or keep them away from the train, which struck one horse and the sleigh, inflicting injuries for which this action was brought. This is the plaintiffs' version of the accident, according to defendant's brief. The defendant contradicted these statements in important particulars, e. g., denying that plaintiff's driver was directed to drive there, and that he did so of his own accord; that after unloading, and before the Michigan Central train arrived, he told Mr. Bankman that he would have to take his team "over town" and hitch, and as soon as he should get through with the Michigan Central train he would give him his receipts; while he was writing them he heard the train coming, and Mr. Lightall, the interlocker man, seized a lantern and ran out to stop it, but was too late, and the train went right on through; that the place was obviously dangerous, and the team stood there at least 15 minutes after the load was taken off; that a person standing by the horses could have seen half a mile down the track. A verdict for \$100 was rendered, and defendant has appealed.

The only question raised is whether the court erred in refusing to direct a verdict for defendant on the ground of plaintiffs' contributory negligence. Counsel contend that the courts commonly hold that it is negligent for one to leave his horses unattended in a place where they are likely to be struck by a passing train. It is not improbable that we might so hold in this case but for the proof that he was directed to do so by the agent, who would be presumed to know when trains would be due and not advise driving into a place such as was occupied in the face of danger. It does not follow that the plaintiff was not chargeable with contributory negligence; but it was not error to leave the question to the jury.

The judgment is affirmed.

HATCH *et al.* v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of North Dakota, May 22, 1906.)

[107 N. W. Rep. 1087.]

Carriers—Shipment of Stock—Contract of Carriage—Construction.
—The words "place of destination," as used in a stipulation in a shipping contract, requiring the giving of notice of injuries to stock before its removal from the place of destination, refer to the town, village, or city to which the shipment is made.

Same—Notice of Injuries—Requirement of Contract—Effect.—A stipulation requiring the giving of such notice of injuries is not strictly a condition precedent to the bringing of an action for damages

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for injuries; but is a limitation upon the right of recovery. A compliance with such stipulation need not be affirmatively shown by the complaint, but noncompliance is a matter of defense to be raised by answer.

Same—Reasonableness of Contract.*—A stipulation in a contract for the shipment of stock, requiring the shipper to give notice to the carrier, of injuries to the stock before it is removed from the place of destination, and before it is mingled with other stock is a reasonable stipulation, and binding upon the shipper when duly entered into.

Same—Consideration.*—Such a stipulation is binding upon the shipper although not based on any consideration except that for the contract generally.

(Syllabus by the Court.)

Appeal from District Court, Wells County; Edward T. Burke, Judge.

Action by J. J. Hatch and another against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

George K. Shaw, Jr., and Alfred H. Bright, for appellant.
Hanchett & Warner, for respondents.

MORGAN, C. J. The plaintiffs entered into a written contract with the defendant under which a carload of horses was to be carried from the Minnesota Transfer to Harvey, N. D. The plaintiffs claim that the horses were injured through the defendant's negligence, and that they were damaged thereby in the sum of \$504. The written contract is attached to the complaint and made a part thereof. The defendant demurred to the complaint upon the ground that it appears upon the face thereof that it does not state a cause of action. The demurrer was overruled. Defendant appeals from the order overruling it.

The contract of shipment contained the following condition or stipulation: "The said shipper further agrees that as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing of his claim therefor to some officer of said railroad company or its nearest station agent before said stock has been removed from said place of destination, and before said stock has been mingled with other stock." It is claimed that the complaint states no cause of action because it fails to state that the notice provided for in said contract was given. The plaintiff contends that the condition above set forth is an unreasonable condition, and therefore void. This contention is based upon other portions of the contract, wherein it is stated that the horses are to be "transported from Minnesota Transfer station to Harvey, N. D. station." This statement in no way affects the agreement concern-

*For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Eckert v. Pennsylvania R. Co.* (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475.

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ing giving of notice. The contract as to shipment was complied with when the horses were delivered at the station. That was the place where the horses were to be unloaded. But the stipulation or agreement as to notice refers to the place of destination. The word "place" in that connection refers to the village of Harvey, and not to the station at Harvey. This is the construction given to the same language used in the contract involved in *Welch v. N. P. Ry. Co.*, 14 N. D. —, 103 N. W. 396.

These conditions or stipulations in shipping contracts are for the benefit of the carrier. Their object is to prevent false claims as to injuries received by stock during shipment. If the stock is mingled with other stock before notice of injuries is communicated to the carrier, he is placed at serious disadvantage in determining the facts as to the injuries claimed. The time during which notice must be given is not limited. Unlimited opportunity is given to ascertain if the stock is injured. The stipulation does not limit the carrier's liability. It simply requires notice to be given that injuries have occurred, before the stock is moved away or mingled with other stock. The shipper is deprived of no right. We are unable to say that the stipulation is an unreasonable one as a matter of law. The following authorities held that similar conditions or stipulations are not unreasonable as a matter of law: *Rice v. K. P. Ry.*, 63 Mo. 314; *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264, 22 L. Ed. 556; *Goggin v. K. P. Ry. Co.*, 12 Kan. 416; *Sprague v. Mo. Pac. Ry. Co.*, 34 Kan. 347, 8 Pac. 465; *Hutchinson on Carriers*, § 259, and cases cited; *Southern Railway Co. v. Adams*, 115 Ga. 705, 42 S. E. 35; *Glenn v. Express Co.*, 86 Tenn. 594, 8 S. W. 152; *Louisville & N. Ry. Co. v. Landers*, 135 Ala. 504, 33 South. 482; *Wichita & W. Ry. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013. The plaintiff further contends that the stipulation is invalid and unenforceable because the complaint shows that it was entered into without consideration. The contention is that some special consideration must have passed between the parties relating to this express stipulation before it becomes binding. This is not true. Conditions like the one in suit become binding and effectual by virtue of the general consideration, for the contract generally, if assented to. It is not a contract limiting defendant's liability. *A. & E. Enc. of Law* (2d Ed.) p. 300; *Crow v. Chi., etc., Ry. Co.*, 57 Mo. App. 135. It therefore follows that the plaintiff's contentions in favor of the complainant are not tenable. The defendant contends that the complainant must state that the notice of injuries was given before the stock was removed from the place of destination, and before it was mingled with other stock. It is further contended in favor of the demurrer that the general allegation that the notice was given as provided by the contract right to maintain an action which were imposed by the contract had been fully performed by the plaintiff is not equivalent to an allegation that the notice was given as provided by the contract and that said allegation is simply a statement of a conclusion and

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not one of fact. Section 5286, Rev. Codes 1899, is relied upon by the plaintiffs in support of the sufficiency of the complaint. That section was construed in *Leu v. Ins. Co.*, 14 N. D. —, 106 N. W. 59, and it was there held that said section does not authorize a general statement of compliance with conditions imposed by contracts in cases in which such conditions are part of the cause of action as distinguished from conditions precedent. It is not necessary to determine whether that section is applicable to this case or not, as the demurrer was properly overruled upon another ground.

The condition or stipulation referred to is not strictly a condition precedent, and it is not part of the cause of action. The cause of action is complete before this condition becomes operative. The cause of action is not created by the contract of the parties. The law controls what facts shall constitute the cause of action. If the law should provide for the notice in the same statute, defining what the cause of action should be, a different question would be presented. But the condition in this case is made by the contract of the parties and the cause of action is defined by the common law. Hence the condition cannot operate as a part of the cause of action. It was therefore an unnecessary allegation of the complaint. A cause of action was completely stated without it. The condition was a limitation upon the right of the plaintiff to maintain the action and pertained to the remedy. It was therefore a matter of defense to be raised by answer, if at all. This court has recently so held in a case involving a similar condition, *Kinney v. Brotherhood, etc.*, 14 N. D. —, 106 N. W. 44. See also, *Kahnweiler v. Ins. Co.*, 67 Fed. 483; 14 C. C. A. 485; *Malloy v. Chi. & N. W. Ry. Co.*, 109 Wis. 29, 85 N. W. 130; *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1; *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033; *Wescott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

The order overruling demurrer is affirmed. All concur.

NASHVILLE, C. & ST. L. RY. CO. v. GRAYSON COUNTY NAT. BANK.

(Supreme Court of Texas, May 9, 1906.)

[93 S. W. Rep. 431.]

Courts—Jurisdiction—Amount in Controversy—Allegation in Petition.—Where a plaintiff sues for an amount sufficient to give the district court jurisdiction, and there is no plea averring that the sum claimed is fraudulently alleged for the purpose of giving jurisdiction, the amount claimed by the petition is the amount in controversy and fixes the jurisdiction, so that the court may proceed to give judgment, though the amount plaintiff is entitled to recover is less than \$500.

Writ of Error—Decisions Reviewable—Amount in Controversy.—

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Rev. St. 1895, art. 996, providing that no writ of error shall lie to a judgment of the Court of Civil Appeals in any civil case appealed from a county court or from a district court when under the Constitution a county court would have had original jurisdiction, does not deprive the Supreme Court of jurisdiction of a suit where the original petition claimed an amount beyond the jurisdiction of the county court, though an amended petition, on which the cause was tried, demanded judgment for a sum within the jurisdiction of the county court.

Carriers—Bill of Lading—Construction.—A bill of lading recited the receipt from the consignor of the goods to be delivered "to his or their assigns," and stipulated that each package of freight should be marked with the name of the consignee and destination, except shipments in car load lots to one consignee. In the margin was written, "S. W. 6746," indicating the number of the car, followed by the name and location of the consignee and the name of the connecting carrier. The blanks in the body of the bill for the name of the place of destination and consignee were not filled. Held, that the goods were consigned to the person named as consignee.

Same—Delivery—Production of Bill of Lading.*—A carrier may deliver the goods to the consignee without requiring the production of the bill of lading, unless it contains a stipulation to the contrary.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by the Grayson County National Bank against the Nashville, Chattanooga & St. Louis Railway Company and others. There was a judgment by the Court of Civil Appeals (19 S. W. 1106), affirming a judgment for plaintiff against defendant the Nashville, Chattanooga & St. Louis Railway Company, and it brings error. Reversed and rendered.

C. H. Smith, J. A. Templeton, and Claude S. Waller, for plaintiff in error.

A. L. Beatty, Head, Dillard & Head, and E. B. Perkins, for defendant in error.

GAINES, C. J. This suit was originally brought by the Grayson County National Bank against the Nashville, Chattanooga & St. Louis Railway Company, the Houston & Texas Central Railway Company, the St. Louis & Southwestern Railway Company, and the St. Louis & Southwestern Railway Company of Texas, to recover damages for the delivery to a company, not entitled to

*For the authorities in this series on the question whether a carrier has the right to deliver freight to the consignee without requiring the production of the bill of lading, see note, 7 Am. & Eng. R. Cas., N. S., 596; *First Nat. Bank of Pullman v. Northern Pac. Ry. Co.* (Wash.), 3 R. R. R. 4, 26 Am. & Eng. R. Cas., N. S., 4 (under commercial usage carrier should deliver articles only on production of bill of lading though it names the consignee); foot-note appended to *General Elec. Co. v. Southern Ry. (S. Car.)*, 17 R. R. R. 76, 40 Am. & Eng. R. Cas., N. S., 76.

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receive them, of three car loads of wheat, upon which the plaintiff claimed liens for sums aggregating \$1,641.45. Subsequently the plaintiff filed an amended original petition against all the defendants, except the Houston & Texas Central Railway Company, in which it alleged that the claims for two of the car loads of wheat had been settled, and in which he sought to recover but for one. The value of this car load was alleged to be \$377.79 and the prayer was for a recovery of \$500 as damages. Upon the trial the plaintiff obtained a judgment against the Nashville, Chattanooga & St. Louis Railway Company alone. That defendant having prayed judgment against its codefendants in case judgment was rendered against, it is was denied a recovery against them. On appeal to the Court of Civil Appeals, the judgment was by that court in all respects affirmed. The appellant having applied to this court for a writ of error to the judgment in favor of the plaintiff bank, its application was granted. The defendant in error, the Grayson County National Bank, now moves to dismiss the writ of error for want of jurisdiction. We are of opinion that the motion should be overruled. The suit, as made by the original petition, being for more than \$1,600, the district court alone had jurisdiction to try it. Where a plaintiff sues for an amount sufficient to give that court jurisdiction, the court may proceed to judgment, although the amount he is entitled to recover be found to be less than \$500. In the absence of a plea to the jurisdiction, averring that the sum claimed is fraudulently alleged for the purpose of giving jurisdiction to the court, the amount claimed as shown by the petition is "the amount in controversy" and fixes the jurisdiction. Where the court acquires jurisdiction by the original petition, it retains it to the end of the suit. After mature deliberation, this principle was announced and acted upon in the case of *Ablowich v. Bank* (95 Tex. 429, 67 S. W. 79, 881), and several decisions of this court to the contrary were expressly overruled.

But it is ingeniously argued, on behalf of the motion to dismiss, that, although the district court had jurisdiction to proceed to judgment, the decision of the Court of Civil Appeals is final. Article 996 of the Revised Statutes of 1895 provides, in effect, that no writ of error shall lie to the judgment of the Court of Civil Appeals in "any civil case appealed from a county court or from a district court when under the Constitution a county court would have had original or appellate jurisdiction to try it," etc. For the reason that the county court would have had jurisdiction to try a case for the amount claimed in the amended petition in this case, it is insisted that it is excepted out of the class subject to review by the Supreme Court; but we think the case meant in the language quoted is that made by the original petition and not the case as actually tried. The car load of wheat, for the value of which a recovery is sought in this case, was delivered at Tom Bean, Tex., to the St. Louis Southwestern Railway Company of Texas by the Sherman Grain Company; to be transported to

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Adairsville, Ga., and was in fact carried by the initial carrier and the St. Louis Southwestern Railway Company to Memphis, Tenn., where it was transferred to the defendant, the Nashville, Chattanooga & St. Louis Railway Company, and was by that company transported to the point of destination. It was there delivered to the Southern Flour & Grain Company. The bill of lading was assigned by the consignor to the defendant in error, the Grayson County National Bank. The latter drew on the Southern Flour & Grain Company for the price of the wheat, attached the draft to the bill of lading, and sent them for collection to Adairsville, Ga. Payment of the draft was refused by the drawee.

The first question presented is as to the construction of the bill of lading. Was it a bill for delivery to a named consignee, or did it merely authorize a delivery to the consignor or to his order? We set out so much of the bill of lading as is material to a determination of this question.

"St. Louis Southwestern Railway Company of Texas.

Rates Guaranteed. From To Via Via Charges Advanced \$ If 1st class . . . per 100 lbs If 2d class . . . per 100 lbs If 3d class . . . per 100 lbs If 4th class . . . per 100 lbs If 5th class . . . per 100 lbs If Class A . . . per 100 lbs If Class B . . . per 100 lbs If Class C . . . per 100 lbs If Class D . . . per 100 lbs If Class E . . . per 100 lbs Cotton per 100 lbs Cotton in dollars per bale. Marks and Numbers SW Southern Flour & Grain Co.	Bill of Lading. No. _____ <i>Tom Bean, Tex. 12-21-00</i> Received from <i>Sherman Grain Co.</i> , the following packages (contents and value unknown) in apparent good order, marked and numbered as per margin, to be transported to _____ and there delivered in like order to _____ his or their assigns, he or they paying freight and charges as per margin. NOTICE. Each package of freight must be plainly marked with name of consignee and destination, except shipment in car load lots, to one consignee; and Cotton, which is provided for by rules governing same. This bill of lading must be presented without alteration or erasures and surrendered, if demanded, upon delivery of articles mentioned herein. In Witness Whereof, the agent of the St. Louis Southwestern Railway Co. of Texas has signed _____ bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. List of Articles. <i>Bulk Wheat.</i> No. 24711
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Adairsville, Ga.
Cf. N. C. & St. L. E. R.
Memphis Tenn.
 [Stamp canceled.] *G. M. Hurd.*

All the words in the bill are printed, except those italicized, which are written in pencil.

The difficulty of construction grows out of the fact that the blanks in the body of the bill, which were left for the name of the place of destination and for that of the consignee, have not been filled. It is to be presumed that the failure to fill the blanks was intentional. Such being the case, it is proper to look elsewhere upon the face of the bill in order to ascertain why the names were not inserted in the blanks left for that purpose. If the name of the consignee and the place of delivery clearly appeared elsewhere upon the face of the paper, then we could see a satisfactory reason why the blanks were not filled. The "notice"

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found in the body of the writing, to the effect that each package should be marked with the name of the consignee and the destination, shows a requirement for marking separate packages (when not in car load lots), and the printed form, having in its margin a place for the insertion of the marks upon the goods, indicates that it was the custom and course of business to insert such marks in that place. Since the bill itself directed that the packages should be marked with the name of the consignee and the destination, the marks as shown in the margin necessarily point out the consignee. Under the printed words "Marks and Numbers" are written in the margin of this bill of lading the name of a company and the name of a place, in the customary form of marking a package for transportation. While the "notice" above referred to does not require a car load lot to one consignee to be marked, the insertion of the name "Southern Flour & Grain Co.," and of the place, "Adairsville, Ga.," show with none the less certainty that the former was the consignee and the latter the place of destination of the shipment. The inference is that the car was in fact marked, although the rule did not require this to be done. Without these notations in the margin and the "notice" in the body of the instrument above referred to, there would probably be such doubt about the construction of the bill of lading, that we would be compelled to resolve it in favor of the assignee of the shipper. But we think they leave no doubt that, under the contract as shown by the bill of lading the goods were distinctly consigned to the "Southern Flour & Grain Co."

But it is stoutly maintained, on behalf of the defendant in error, that even if the bill of lading is to be construed as not a consignment to the shipper's order, yet the carrier is liable as for a delivery to the wrong party. In the case of *Dwyer v. Railroad Company*, 69 Tex. 707, 7 S. W. 504, it is said that the carrier is entitled to demand the bill of lading before delivering to the consignee. Whether this remark was called for by the decision of that case, and whether it be correct, we need not determine. We think he would clearly have this right provided he had any good reason to doubt the consignee's right to receive the goods. It is therefore plausible to say that the defendant company should have demanded the bill in this case, and that, if it had done so, it would have seen that the bill had been assigned, which would at least have led to an inquiry which, if diligently prosecuted, would have disclosed the fact that the goods were not to be delivered to the consignee until the purchase price had been paid. But while it has been held that, if the parties to a bill of lading stipulate that the goods shall not be delivered without its production, the carrier is not excused for a delivery to the consignee when the bill was not presented; yet we understand the law to be that, in the absence of such a stipulation, the carrier may deliver without requiring its production. We have found an expression in the opinions of some of the courts to the effect that, if a delivery be made in the absence of the bill of

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lading, the carrier takes the risk; but we apprehend that it is merely meant that he takes the risk of the bill being such as authorizes a delivery to the person to whom he may deliver. It is laid down as elementary law that the consignee is presumably the owner of the goods. He is entitled to demand a delivery of them, subject only to the right of stoppage in transitu, and therefore the carrier may safely deliver to him, provided always the latter has no notice of a limitation upon the right in favor of an adverse claimant. In an article in the *Cyclopædia of Law and Procedure*, prepared by an eminent jurist, the law in reference to this matter is thus stated: "Where the carrier receives the goods under a contract, either express or implied from the marks on the goods, to deliver them to a person named, without any reservation of power of disposal by the consignor, then the delivery to such person completes the contract and relieves the carrier from further liability. This rests on the assumption, which the carrier is authorized to entertain, that the title to the goods passes to the consignee on the delivery to the carrier. But if the carrier has notice that the consignee is not the owner, nor entitled to receive the goods, delivery to him will constitute conversion." 5 Cyc. 468. The proposition is well sustained by numerous decisions of the courts, some of which are cited in the notes. *So. Express Co. v. Williams*, 99 Ga. 482, 27 S. E. 743; *Nebraska Meal Mills v. Railway Co.*, 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183; *Marshall v. Railroad Co.*, 45 Barb. (N. Y.) 502; *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311, 24 Pac. 284; *B. & M. R. Co. v. W. M. Co.*, 76 Me. 260; *Sweet v. Barney*, 23 N. Y. 335; *Penn. Co. v. Holderman*, 69 Ind. 18; *Foy v. Railroad Co.* (Minn.) 65 N. W. 627; *Gates v. Railway Co.* (Neb.) 60 N. W. 584; *Weisman v. Railroad Co.*, 22 R. I. 128, 47 Atl. 318; *Dobbin v. Railroad Co.*, 56 Mich. 522, 23 N. W. 204. We are of opinion that, under the undisputed evidence in this case, the plaintiff in error was not liable for the delivery of the wheat, and therefore the judgment is reversed, and here rendered in its favor.

ADAMS EXPRESS CO. v. WALKER.

(Court of Appeals of Kentucky, Nov. 22, 1904.)

[83 S. W. Rep. 106.]

Carriers—Limitations of Actions—Contract—Public Policy.—An agreement in a contract of shipment that no suit for damages should be brought, unless commenced within six months after the loss, is in effect an attempt to vary the statute of limitations, and against public policy and unenforceable.

Limitations of Actions—What Law Governs—Comity.—Limitation is governed by the law of the forum, and the courts of this state will

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not, as a matter of comity, enforce a contract made in another state, fixing the time within which a suit arising out of such contract shall be brought.

Loss of Freight—Presumption of Negligence.*—Where three dogs, securely crated, were delivered to a carrier, and only two remained in the crate when it was delivered at its destination, and no account was given by the carrier of the missing dog, negligence upon the part of the carrier will be presumed.

Carriers—Limiting Liability—What Law Governs—Burden of Proof.†—Where a contract for the carriage of a dog, made in Ohio, limiting the carrier's common-law liability, would have been invalid in Kentucky, under Const. § 196, forbidding carriers to contract away their common-law liability, the carrier should show, in order to protect itself under such contract, not only that the contract was valid under the law of Ohio, but that the loss of the dog, constituting the nonperformance of the contract, also occurred there.

Same—Same—Validity of Stipulation.‡—Under Const. § 196, forbidding common carriers to contract away their common-law liability, a contract providing for the release and discharge of a carrier from all liability for the loss of dogs, unless caused by the negligence of the agents or employees of the carrier, and restricting the carrier's liability to \$25 on account of the loss of any of the dogs, is invalid.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by I. L. Walker against the Adams Express Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Maxwell & Ramsey and John R. Schindel, for appellant.

S. D. Rouse and Charlton Thompson, for appellee.

HOBSON, J. Appellee, Walker, was the owner of an English setter bitch. On November 13, 1902, he delivered her, securely crated with two dogs, to the Adams Express Company, at Wooster, Ohio, to be carried to Vanceburg, Ky., and there delivered to J. C. Walker, his agent. When the crate reached Vanceburg, the bitch was missing, and he filed this suit to recover of the Express Company \$250, her alleged value. The defendant, by its answer, denied that it was a common carrier of live stock, or

*For the authorities in this series on the subject of the burden of proving that the carrier is liable for loss of or injury to freight, see foot-notes appended to *Nashville, etc., Ry. v. Stone & Haslett (Tenn.)*, 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88; *Peterson v. Chicago, etc., Ry. Co. (S. Dak.)*, 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48.

†As to whether the law of the place where the contract was entered into governs a contract purporting to limit the carrier's liability, see foot-note appended to *Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.)*, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

‡As to whether a common carrier may limit its liability, see foot-note appended to *Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.)*, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504, where all the preceding authorities in this series are referred to.

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that the bitch was lost by its negligence, or was of value exceeding \$25. It also pleaded as follows: "Prior to the delivery of said dogs to the defendant, it notified plaintiff that its charges for carrying the same would be based upon the value of the dogs—said value being unknown to defendant—and requested plaintiff to declare the value thereof, in order that defendant might fix its charges; that its charges would be \$2.70 if the value of each dog did not exceed the sum of \$50, and proportionately greater if the value of the dogs exceeded \$50 each; and the plaintiff, in pursuance of said notice and request, then well knowing the value of said dogs, and their value being wholly unknown to the defendant, declared to the defendant that the true value of said dogs did not exceed the sum of \$50 each, and on the faith of said declaration, and in consideration of said charge of \$2.70, based upon said valuation of said dogs, the plaintiff and defendant entered into an agreement in writing, which was valid by the laws of Ohio, whereby the defendant agreed to carry said dogs from Wooster, Ohio, to Vanceburg, Kentucky, for the sum of \$2.70, and the plaintiff agreed to, and did, release and discharge the defendant from all liability for loss of said dogs from any cause whatsoever, unless such loss should be caused by the negligence of the agents or employees of the defendant, and that the defendant should not be liable to the plaintiff, in any event, in excess of \$25 on account of the loss of any of said dogs. Said agreement further provided that no suit should be brought against the defendant for recovery for the loss of said dogs unless commenced within six months next after such loss should have occurred, and that, if any suit should be commenced against the defendant after the expiration of said six months, lapse of time should be taken as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding." The court sustained a demurrer to this part of the answer. On the trial of the case the following agreed statement of facts was filed: "By consent of parties a trial by jury is waived, and the following facts are agreed to: That the bitch in the petition described was shipped as alleged in the petition; that her value was unknown to the defendant; that a special contract of shipment was signed by the parties; that the defendant held itself out as a carrier of live stock only under the conditions of said special contract, a copy of which is filed as a part of this agreed statement; that the bitch was properly crated; that she escaped from the custody of the defendant somewhere between Wooster, Ohio, and Vanceburg, Kentucky; and that her value was two hundred (\$200) dollars." The circuit court entered judgment in favor of the plaintiff, and the defendant appeals.

In *Western Union Telegraph Company v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361, a telegram was sent from Atlanta, Ga., to Franklin, Ky. One of the conditions printed on the back of the message was that no action should be brought for damages unless commenced within

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60 days after the message was sent. The court, after laying down the rule that public policy forbids that a carrier should by any contract exempt itself from damages resulting from its own negligence, said in reference to the contract limitation of 60 days for the bringing of the action that it is the province of the lawmaking power to prescribe the time in which an action may be brought, and that the limitation of 60 days, if not an attempt to vary the statute of limitation, would, if enforced, have that effect. This case was approved in *Davis v. Western Union Telegraph Company*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371, where the court again said as follows as to the limitation of 60 days contained in the contract: "That such a provision, as respects telegrams, is contrary to public policy, and will not be upheld, seems to be indicated in *Smith v. W. U. Telegraph Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, and the rule is authoritatively so announced by this court in *Telegraph Co. v. Eubank*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361. It was error to hold that the stipulation presented a valid defense."

It is insisted for appellant that, the contract here having been made in Wooster, Ohio, it must be governed by the laws of Ohio, and that by the laws of Ohio such a limitation is valid. Limitation is governed by the law of the forum in which the suit is brought, and the courts of this state will not, as a matter of comity, enforce a contract made in Ohio as to the time when the suit shall be brought, for this is regulated by our statutes.

From the agreed facts, negligence on the part of the defendant may be inferred, for if three dogs were delivered to it securely crated, and two remained in the crate when delivered at Vanceburg, no account being given by the defendant of the missing dog, clearly it should be presumed that the defendant or some of its agents converted the dog, or by negligence allowed it to escape. We are referred to decisions of the Supreme Court of Ohio holding that a common carrier cannot by contract protect itself from its own negligence, and that this rule applies to the carriage of animals. *Wilson v. Hamilton*, 4 Ohio St. 723; *U. S. Express Co. v. Backman*, 28 Ohio St. 144; *Railroad Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61. But we cannot take judicial notice of the law of Ohio. The demurrer admits the truth of the plea. In *Cleveland, etc., R. Co. v. Druen*, 80 S. W. 778, 26 Ky. Law Rep. 103, this court had before it the question by what law a contract of carriage is governed where the contract is made in another state, and the goods are to be delivered in this state. The rule was there laid down that, where the contract is valid in the state where it is made, the law of that state governs it, so far as it is to be performed outside of this state, but that the law of this state governs it so far as it is to be performed in this state. In the case of *Western Union Telegraph Company v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361, it was not pleaded that the contract was valid under the law of Georgia, or that the loss occurred there;

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and the court seems to have had in mind, in what it said in that case, only the limitation of the action to 60 days. The same is true of the case of *Cincinnati, etc., R. Co. v. Graves*, 52 S. W. 961, 21 Ky. Law Rep. 684. The cases of *I. C. R. Co. v. Radford*, 64 S. W. 511, 23 Ky. Law Rep. 886, and *L. & N. R. Co. v. Frazee*, 71 S. W. 437, 24 Ky. Law Rep. 1273, involved contracts made in this state. Section 196 of the Constitution governs such contracts. Its language is, "No common carrier shall be permitted to contract for relief from its common law liability." The Constitution of Kentucky has no extraterritorial effect, and this provision does not govern contracts made elsewhere which are lawful by the law of the place where they are made. It governs contracts made in Kentucky, and these, being unlawful at the place where they are made, are void everywhere; but contracts that are made elsewhere, and are valid where made, will be governed here by the law of the place where they are made, so far as they are not performed here. Under this rule the court properly sustained the demurrer to the defendant's plea of the law of Ohio, as it did not show that the dog was lost in Ohio; and, to protect itself under the Ohio law, it should have shown not only that the contract was valid under the law of Ohio, but that the nonperformance of the contract occurred there.

It remains to determine what are the rights of the parties under the law of Kentucky. In *Ondorff v. Adams Express Company*, 3 Bush, 194, 96 Am. Dec. 207, a contract limitation similar to the one relied on here was considered by the court, and it was held that a common carrier could not by such a contract exempt itself from losses by negligence. This case was followed in *L. C. & L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740, which was, like this, a case where damages were sought for the carriage of animals. To same effect are *Rhodes v. L. & N. R. Co.*, 9 Bush, 688; *L. & N. R. Co. v. Brownlee*, 14 Bush, 590; *L. & N. R. Co. v. Owen*, 93 Ky. 201, 19 S. W. 590; *Baughman v. L. & N. R. Co.*, 94 Ky. 150, 21 S. W. 757. The precise question here raised was made in *Cincinnati, etc., R. Co. v. Graves*, 52 S. W. 961, 21 Ky. Law Rep. 864, where it was alleged that the stock was undervalued, and thereby the defendant was misled as to its value. The plea was held bad. That shipment was made from Cincinnati, Ohio, to Lexington, Ky. The same question was again made in *I. C. R. Co. v. Radford*, 64 S. W. 511, 23 Ky. Law Rep. 886, where the shipment was from Hopkinsville, Ky., to Evansville, Ind., and *L. & N. R. Co. v. Frazee*, 71 S. W. 437, 24 Ky. Law Rep. 1273, where the contract was also made in Kentucky. Where the exact question here made was presented in only one of these cases, and there are expressions in some of the opinions limiting them to the particular facts before the court, still the reasoning in all the cases is against the validity of such contracts, and we regard them as settling the rule in this state under our constitutional provision. In the absence of a special contract, it would not be maintained that the defendant is not liable for

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the value of the dog lost. But our Constitution declares the contract limiting this liability void. So the contract is as though it had not been made, and the defendant is liable, unless sufficient facts are shown independently of the special contract to avoid the contract for fraud, or to create an estoppel at common law. Judgment affirmed.

STATE v. THOMPSON.

(Supreme Court of Oregon, Feb. 6, 1906.)

[84 Pac. Rep. 476.]

Carriers—Sale of Tickets—Ticket Scalpers.—Laws 1905, p. 422, requiring railroads to provide agents authorized to sell tickets with a certificate of authority, and making it unlawful for a person not possessed of such a certificate from a railroad to sell tickets or operate a ticket office, prohibits the ticket brokerage business, and restricts the sale of railroad tickets by others than duly constituted agents of the railroads issuing the same.

Constitutional Law—Due Process of Law—Prohibition of Business.*—The act is not repugnant to Const. U. S. Amend. 14, nor to Const. Or. art. 1, § 10, guarantying due process of law.

Same—Obligation of Contracts.*—Nor does it violate Const. art. 1, § 21, prohibiting the passage of laws impairing the obligation of contracts.

Same—Equal Protection of Laws.*—Nor does it violate Const. art. 1, § 20, prohibiting the grant of special privileges, nor Const. U. S. Amend. 14, guarantying equal protection of the laws.

Commerce—Interstate Commerce—State Regulation.†—Nor does the fact that it relates to tickets of railroads without, as well as to those of railroads within, the state, render it repugnant to Const. U. S. art. 1, § 8, giving Congress power to regulate commerce among the several states.

Constitutional Law—Police Power—Prevention of Fraud.*—Nor is

*For the authorities in this series on the subject of ticket scalping and the sale of railroad tickets by unauthorized persons, see *Schubach v. McDonald* (Mo.), 11 R. R. R. 613, 34 Am. & Eng. R. Cas., N. S., 613; *Sheftall v. Central of Georgia Ry. Co.* (Ga.), 17 R. R. R. 209, 40 Am. & Eng. R. Cas., N. S., 209 (tickets in possession of discharged conductor, question for jury whether publication to prevent their use is libelous); note appended to *Commonwealth v. Keary* (Pa.), 20 Am. & Eng. R. Cas., N. S., 471 (constitutionality of "anti-ticket scalper laws"); note appended to *People v. Warden of City Prison* (N. Y.), 14 Am. & Eng. R. Cas., N. S., 474 (constitutionality of statutes making the sale of tickets, except by agents of carriers, unlawful).

†For the authorities in this series on the subject of state regulation of interstate commerce, see foot-note appended to *United States Express Co. v. State* (Ind.), 18 R. R. R. 73, 41 Am. & Eng. R. Cas., N. S., 73; foot-note appended to *Illinois Cent. R. Co. v. Mississippi Railroad Commission* (C. C. A.), 17 R. R. R. 544, 40 Am. & Eng. R. Cas., N. S., 544.

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it an unconstitutional prohibition of a lawful calling, but rather a lawful exercise of the police power of the state, enacted in order to protect travelers from fraud.

Appeal from Circuit Court, Multnomah County; A. L. Frazer, Judge.

C. H. Thompson was convicted of violating the anti-scalping act, and appeals. Affirmed.

This is an appeal from a judgment of conviction for violating what is commonly known as the anti-scalping act, passed at the last session of the Legislature, and found on page 422 of the Session Laws of 1905. The act provides in substance as follows: Section 1: That it shall be the duty of the owner or owners or person or persons operating a railroad to provide every agent who may be authorized to sell its tickets or other evidence of a right to travel upon any railroad with a certificate setting forth the authority of such agent to make such sale, which certificate must be duly attested and signed. Section 2: That every agent, person, firm, or corporation engaged in selling, issuing, or dealing in railroad passenger transportation in this state must have a fixed place of business, and keep the certificate mentioned in section 1 posted in a conspicuous place therein. Section 3: That it shall be unlawful for any person mentioned in section 2, who is not possessed of and has not posted the certificate mentioned, to sell, exchange, or transfer or offer for sale, exchange, or transfer, the whole or any part of a railroad ticket or pass or other evidence of a right to travel on any railroad, whether the same is situated within or without the limits of this state. Section 4: That it shall be unlawful for any person named in section 2 to set up, establish, or maintain, conduct, or operate within the state any office or other place for the sale, exchange, or transfer of railroad tickets, or any part thereof, or passes or any other evidence of a right to travel on any railroad within or without the limits of the state, unless such person is possessed of and has posted the certificate above mentioned. Section 5 makes the displaying of any sign bearing certain words, without having posted the certificate as above mentioned, sufficient evidence to establish a prima facie case against the owner, proprietor, employee, or person in charge of said office or place of business. Section 6 provides a penalty for the violation of sections 1, 2, 3, and 4. Section 7 requires the owner or person operating any railroad in this state or any railroad doing business therein to redeem, upon presentation by the lawful holder thereof, the whole or any part of any unused ticket, and how such redemption shall be made, and the time within which it must be presented for redemption. Section 8 provides a penalty for refusal, neglect, or failure to redeem as provided in section 7.

Martin L. Pipes, John F. Logan, and Henry E. McGinn, for appellant.

John Manning, Dist. Atty., and Dan J. Malarkey, for the State.

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HAILEY, J. (after stating the facts). The only question raised on this appeal is the constitutionality of the foregoing act. It is claimed: First. That it violates the following sections of article 1 of the state Constitution: Section 10, which declares that "every man shall have remedy by due course of law for injury done him in person, property, or reputation." Section 20, which declares, "No law shall be passed to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." And section 21, which declares, "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Second. That it violates the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of liberty or property without due process of law; and also violates section 8 of article 1 of the Constitution of the United States, which gives to Congress the power to regulate commerce among the several states. In this opinion, for brevity and clearness, we will apply the word "ticket" to all kinds of railroad transportation mentioned in the act, and use the word "railroad" as synonymous with the words in the act, owner or operator of any railroad. Before discussing the various contentions made by the defendant as above set forth, we deem it necessary to ascertain the effect of this law, and then will consider the question whether or not it violates any of the above provisions of our state and federal Constitutions.

1. It is contended on the part of counsel for appellant that this act does not prohibit the ticket brokerage business, but permits it when done by one having the certificate provided for in the act, and only makes it a crime when done by one not holding such certificate. Such a construction of the law gives no force to the relation of principal and agent necessarily created by the appointing certificate. The holder of such certificate is the agent of the railroad issuing the same, and his acts in selling, issuing, and dealing in tickets are the acts of his principal and binding upon such principal, and are not the acts of such agent in his individual capacity acting upon his own account. Again, such a construction also gives to the agent authority not warranted by the terms of the act, by imputing to him the right to deal generally in all tickets, whether issued by the railroad appointing him its agent, or some other railroad. By the terms of this act the agent is expressly limited in his authority to sell, issue, or deal in tickets issued by the railroad appointing him, and has no authority by virtue of a certificate from one railroad to sell or deal in the transportation of another railroad from which he holds no certificate. The agent, as well as the railroad appointing him, is limited to selling, issuing, and dealing in its tickets, and such agent must do so as its agent, and cannot deal in tickets of another railroad for which he is not agent. The right to issue, sell, and deal in railroad

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transportation is thus limited to the railroad acting through its agents, and it follows that when done by a ticket broker or other person not authorized and acting as agent for the railroad, such transactions are unlawful and punishable under this act, and thus prohibited thereby.

2. The question, then, is: Does this law violate any of the constitutional provisions above mentioned? It is argued by counsel for the defendant that it takes property without due process of law. Defendant contends that the purchaser of a transferable ticket has a right to do with it as he pleases, and that to limit his right to sell or otherwise dispose of it is depriving him of his property therein without due process of law. It does not deprive the purchaser of a ticket of his property. It only limits the manner in which he shall use such property. It is one thing to take away the property of a person, and another to limit his use of such property. In the case of the purchase of a railroad ticket, the railroad sells it to the purchaser for the purpose of transportation over the lines of the seller, and not for barter or trade in the market, and he is not deprived of his property therein so long as he has the right to use it for the purpose for which it was sold to him, and the presumption is that he purchased it for the purpose for which it was sold. In addition to the right to use it for its original purpose, the act in question gives him the additional right to compel the seller to redeem it, in the event the purchaser fails to use it, if presented for redemption within a certain time.

3. It is next contended that the law violates the constitutional provision which prohibits the passing of any law impairing the obligations of contracts. This contention is not tenable, for the reason this constitutional provision only prohibits the passage of laws impairing the obligations of contracts in existence at the time the law took effect, and therefore it has no application to the case at bar, the ticket in controversy having been sold by the railroad after this law went into effect. This law is prospective and not retrospective in effect, and is clearly not an *ex post facto* law, as it does not undertake to punish the defendant for an act done prior to the time it took effect, the doing of which was at that time not a crime.

4. Counsel for defendant argue that the law grants privileges to some persons not granted to others upon the same terms, and therefore violates section 20, art. 1, of the state Constitution, and the fourteenth amendment to the federal Constitution, and cites in support of this contention *In re Oberg*, 21 Or. 406, 28 Pac. 130, 14 L. R. A. 577, in which it was claimed that an act providing "that no officer or seaman of a sea-going vessel, or ship shall be arrested or imprisoned for debt; and any officer executing a process of arrest for debt upon such officers or sea-men shall upon conviction * * * be fined," etc., was in violation of the foregoing section of the Constitution, but the act was upheld by this court on the ground that since there was no dis-

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crimination between persons of the class of sailors mentioned, it was not unconstitutional. The court said: "All sailors of a sea-going vessel within the prescribed limits are treated alike, and entitled to enjoy the privileges or immunities granted. The act prescribes the same rule of exemption to all persons placed in the same circumstances. It does not grant a sailor immunity from arrest for debt, and refuse it to his neighbor, if they be similarly situated. * * * Any person who is a sailor may enjoy the immunity, and any citizen desiring such immunity may have it, in the words of the Constitution, 'upon the same terms,' by becoming a sailor." So in the case at bar the privilege, if such it be deemed, of selling tickets under this act, is granted to railroads only to be done by them directly or through their agents, and all railroads are treated alike and entitled to enjoy the privileges or immunities granted, and any one desiring to secure like privileges and immunities can do so by becoming one of that class. The difficulty with the argument on the part of the defendant is that it fails to make a distinction between the persons who, as agents of the railroads, act for them, and such persons acting in their individual capacity as third persons. If the law allowed such agents to act in their individual capacity, and not as agents solely when possessed of the certificate provided for in the law, it would doubtless be amenable to the objection raised by the defendant; but such is not the case. Furthermore, defendant has no unqualified right to sell and deal in the tickets of a railroad, and is therefore not deprived of a privilege or immunity guarantied by the Constitution, as the right claimed is not one of the fundamental rights guarantied by this clause of the Constitution. It is argued, however, that the defendant cannot bring himself within this class; it being contended that the Legislature has delegated to the railroad companies the power to classify the citizens of the state and authorize some of them to conduct a business and prohibit all others from engaging in the same business. Here, again, the representative capacity of the agent of the railroad is confounded with his individual capacity. It is the railroads themselves that are classified, and not the individuals who may act as agents for them. Prior to the passage of this act the railroads had a right to sell tickets and appoint agents; that was one of their privileges, and they were not required to furnish them with certificates showing such agency; and the act does not take away either privilege, but adds the requirement of furnishing such agents with a certificate. All railroads dealing in tickets within the state, like "all seamen of sea-going vessels," are treated alike.

5. It is next claimed that the act interferes with the interstate commerce clause of the federal Constitution, in that it relates to tickets of railroads without as well as within the state. We cannot see the force of this contention. Under the law the railroads can sell as freely as they could before. The one additional requirement is that they furnish their agents with a certificate of

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authority. It does not attempt to regulate commerce within the meaning of that term as interpreted by the Supreme Court of the United States. It casts no burdens upon commerce, and places no obstacles in its way. Its operation is wholly within the limits of the state and within the police power of the state. As stated in Nashville, etc., *Ry. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, "such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

6. Finally, it is urged that the Legislature has no right to prohibit a lawful and harmless calling, and it is urged that the ticket brokerage business has always been a lawful and proper vocation, and may be honestly conducted. The Legislature, however, has seen fit to prohibit the conduct of such business in order to protect travelers from fraud, and the facts alleged in this complaint, if true, apparently uphold the Legislature in the wisdom of its act. With this, however, this court has nothing to do. It is within the power of the Legislature to prohibit the doing of acts that in themselves have been and are legal, as, for instance, the catching of salmon during certain seasons of the year may be prohibited, the killing of wild game may be prohibited, and numerous other instances which are found upon our statute books. Consequently this contention is not tenable. *City of Portland v. Meyer*, 32 Or. 368-371, 52 Pac. 21, 67 Am. St. Rep. 538; *State v. Schuman*, 36 Or. 16-25, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754.

We deem it unnecessary to discuss further the questions argued upon this appeal, for the reason that legislation similar to the act in question has been adopted in many of our sister states, and its constitutionality has been fully sustained by all of their highest courts, with the single exception of the state of New York, where two dissenting opinions were rendered that agree with the following decisions, which fully discuss all questions raised in the case at bar, and all of which hold it to be within the police power of a state, through its Legislature, to enact such a law as the one in question: *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472; *Jannin v. State*, 42 Tex. Cr. R. 631, 51 S. W. 1126, 96 Am. St. Rep. 821; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *In re O'Neill* (Wash.; Dec. 27, 1905) 83 Pac. 104; *State v. Manford* (Minn.; Oct. Term, 1905) 105 N. W. —. The only courts holding adversely to the above decisions are the courts of New York, which follow the opinion of Chief Justice Parker, of the New York Court of Appeals, in the case of *People ex rel. Tyroler v. Warden of Prison*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, in which case the decision is largely based upon two grounds: First, that the New York stat-

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ute conferred authority upon an agent of one railroad to sell the tickets of any other railroad, which the statute in this state does not do, expressly limiting his authority to the sale of the tickets of the road appointing him; and, second, on the ground that the act was a violation of the liberty of the citizens guarantied him by the Constitution to engage in ticket brokerage, which the state could not take away by the exercise of its police power. We are, however, unable to agree with the logic or the reasoning of that opinion, but prefer to accept the reasoning and logic of the two dissenting opinions written in the same case, which have been practically adopted by the cases above mentioned.

We therefore hold the act valid, and the judgment of the lower court is affirmed.

SCHMIDT v. NEW ORLEANS RYS. CO.

(Supreme Court of Louisiana, Jan. 15, 1906.)

[40 So. Rep. 714.]

Carriers—Injury to Passengers—Street Railroads—Neglect of Conductors.—The defendant railway company, by its act of incorporation, came under certain legal obligations for the safety and protection of the public, and particularly of its passengers. It had for that purpose to act through its employees, for whose acts it was responsible. The conductor of a street car represents the street railway company. The company cannot free itself from the obligations referred to by failing to give its conductors full and specific instructions or by restricting the limit and extent of their authority, so as to disable them from properly performing duties which it is inherently necessary and essential they should have to carry out to the extent of legal requirements of the functions of the positions in which they are placed. It cannot, by merely enjoining upon the conductors to perform their duties cautiously, prudently, and well, break the effect of their failure to comply with these instructions; nor can it, by throwing the instructions into the form of prohibitory orders, alter the legal scope of their powers, duties, and authority. These are matters which it cannot lessen and make to fall below the limit of authority affixed by the law to the positions themselves.

Same—Arrest of Passenger.—The conductor of a street car invited a police officer to come upon his car, saying there was a pickpocket upon it. After he entered the conductor pointed out to him one of the passengers on the car as being such. The policeman arrested the passenger, took him off the car short of his destination, marched him under arrest through a crowded street, and sent him in a patrol wagon to a police station, where he was detained several hours and then released without any charge having been preferred against him. He was shown to be a man of good character and position.

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Same—Liability of Carrier.*—The conductor did not himself make the arrest, but it was through his instrumentality that the passenger was arrested and ejected from the car and taken to the station. The conduct and course pursued by the policeman was the direct and natural consequence of that of the conductor. Under the Civil Code, he who causes another person to do an unlawful act, or assists or encourages the commission of it, is answerable in solido with that person for the damage occasioned by that act.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Peter C. Schmidt against the New Orleans Railways Company. Judgment for plaintiff and defendant appeals. Affirmed.

Harry Hinckley Hall, for appellant.

George Montgomery and *Albert Guilbault*, for appellee.

Statement of the Case.

NICHOLLS, J. The plaintiff prays for a judgment in his favor against the defendant for this: That the New Orleans Railways Company is a corporation doing business in this city as operator of street cars.

That on February 15, 1904, between the hours of 10 and half past 10 o'clock p. m., he was a passenger on car No. 253 of the Clio street line of cars operated by the defendant corporation then in charge of Conductor Jules Mossy; that petitioner had paid his fare on entering the car at the intersection of Royal and Orleans streets and was peaceably riding on said car to his intended destination, namely, 2230 Clio street, when, at the intersection of Canal and Royal streets, the said Conductor Jules Mossy, while acting as the agent of the defendant corporation and within the scope of his employment and with the intention of carrying out the instruction given him by said defendant corporation and its officers or agents superior to him and of performing his duty of protecting the passengers on said car, as he thought, did call Police Officer Methé and two other police officers of the local police force, who entered from the rear and front of said car, and then and there, in the presence of a car load of passengers, unceremoniously and without reason or cause did eject petitioner from said car and order said police officers to remove petitioner from said car and arrest him as a pickpocket.

*For the authorities in this series on the question whether a railroad company is liable for the arrests or prosecutions made or instigated by its servants or agents, see foot-note appended to *Milton v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 653, 41 Am. & Eng. R. Cas., N. S., 653; *Baltimore & O. R. Co. v. Deck* (Md.), 18 R. R. R. 640, 41 Am. & Eng. R. Cas., N. S., 640; foot-note appended to *Evans v. Atlantic Coast Line Ry.* (Va.), 18 R. R. R. 624, 41 Am. & Eng. R. Cas., N. S., 624.

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That the said conductor, in the presence of all the passengers, charged petitioner with being one of the pickpockets who escaped from his car a few evenings before, and, by persisting in the statement and not permitting petitioner to explain, that he (the conductor) was making a mistake, and, by instructing said police officers to arrest petitioner as the pickpocket who had escaped from his car, humiliated petitioner.

That thereupon, at the instance of said conductor, whilst acting as aforesaid, he was removed from the car (although his intended destination was 2230 Clio street, though he remonstrated), and was walked through Royal street from Canal to Customhouse, now called Iberville, street, followed by a large and inquisitive gathering, to the patrol box at the corner of Iberville street and Exchange alley, where he was compelled to stand and be gazed upon and inquired about by a large gathering of citizens until the arrival of the police patrol wagon, when he was ignominiously placed in said wagon like a common felon, in the presence of the aforesaid gathering, amongst which were many of his acquaintances, and driven to the Third precinct police station, when, after being questioned by the captain in charge, and upon the remonstrance and representations of several of his friends who had witnessed the outrages heaped upon him and who followed him to the station house to protest against such treatment, he was allowed to depart without even a charge being preferred against him.

That all this happened on the night before Mardi Gras just after the Proteus parade, at a time when both Canal and Royal streets, as well as Iberville street and Exchange alley, were unusually crowded with residents of and visitors to this city; that a vast throng witnessed his arrest, greatly to his chagrin and humiliation, and that the mental agony and mental and bodily suffering of petitioner whilst being escorted by the police officers through the streets as a pickpocket were indescribable, and that he was equally tortured and humiliated by the gross, wanton, and uncalled for insult and abuse heaped upon him as aforesaid by said conductor whilst acting within the scope of his duties and instructions, on said car, as the agent of said defendant corporation.

That he has made amicable demand upon said defendant corporation for reparation and for the amount herein sued for as damages, without avail; that he has suffered damages in said sum for injury to his feelings, humiliation, mental and bodily agony, and suffering, loss of reputation and time, and chagrin.

That he was born in New York City 25 years ago, and has been a resident of this city continuously for the past 8 years; that he has always borne an excellent reputation for honesty and as a respectable and peaceable citizen; that the outrageous treatment to which he has been subjected by reason of the fault of said defendant corporation's agent has preyed upon his mind to such an extent that he has never been the same in health or spirits since the occurrence of the outrage.

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In view of the premises petitioner prays that said New Orleans Railways Company be cited according to law; and that after due proceedings had there be judgment in favor of petitioner and against said New Orleans Railways Company in the full sum of \$5,000, with legal interest from judicial demand, for costs and general relief.

Defendant answered, pleading the general issue.

The court rendered judgment in favor of the plaintiff, in the sum of \$750, with interest from date of judgment.

Defendant appealed.

Plaintiff answered the appeal, praying for an increase in the judgment to the amount prayed for.

Opinion.

The testimony adduced on the trial of this case established beyond the possibility of a doubt that about 10 o'clock on the night of February 15, 1904, the plaintiff entered on Royal street at the corner of Orleans, as a passenger on car No. 61 of the Clio street line of cars, owned and operated by the defendant company, for the purpose of going to his home on Clio street; that he paid his fare as a passenger; that while thus upon the car he was guilty of no wrong or fault; that when the car reached the corner of Royal and Canal streets a policeman entered the car, arrested him, and took him off the car in the presence of a large number of passengers, placed him under arrest, and, followed by a large crowd, carried him to the corner of Exchange alley and Iberville (Customhouse) streets, from which place the officer sent him in a patrol wagon to the police station, opposite Jackson Square, where he remained until 1 o'clock at night. At that time he was released, without any charge being brought against him; it having been shown to the satisfaction of the officers of police that the arrest which had been made was the result of mistaken identity. The plaintiff is shown to have been a man of good character, standing, and position, and was necessarily greatly mortified and humiliated by the treatment he received.

The occurrence took place on the night before Mardi Gras. At that season the city is filled with strangers seeking pleasure, who are accompanied or followed usually by numbers of thieves and pickpockets endeavoring to take advantage of the crowded streets and cars to ply their illegal practices.

It seems that, upon a report made by the conductor of the car No. 61 of the Clio street line to the inspector of the company, Winters, that several evenings before several of these pickpockets had entered upon his car, the inspector called up some of the police officers by telephone, communicated to them the information he had so received, and directed them to place themselves in communication with the conductors; which accordingly they did. Upon the information thus received, Detectives Schultz and Reynolds entered several days later in citizens' dress into the car, and upon a nod from the conductor they arose and went to the front of the car, where several pickpockets who were aboard the

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car took alarm; one ran to the front platform and jumped over the dashboard, followed by Detective Schultz, who, however, failed to arrest the man.

The arrest made on the night of the 15th of February seems to have a sequence of that just referred to and of the information of the situation of affairs which had been brought to the notice of the police. When car No. 61 stopped that night at the corner of Royal and Canal streets, there were several policemen standing in the immediate neighborhood, among others, Policeman Methe, who arrested the plaintiff. The following is his version of what took place: He was stationed at the corner of Royal and Canal streets. "The conductor of car No. 61 of the Clio street line says to me: 'Officer, here's a pickpocket on the car.' I went through the front of the car, and he points the man out. I got the man. I took him out of the car. While I was taking the man out several gentlemen whom I knew by sight said, 'The conductor is mistaken; and I was in doubts, so I took the man down to Exchange alley and Customhouse street and rang the wagon, and several more gentlemen came there and told me they knew the man; knew him to be a respectable sort of person. So the wagon came, and I did not want to put myself into it. I held the man subject to the captain's orders. Captain Walsh, the commander of the precinct, when he got to the station, released the man. * * * The conductor told me there was a pickpocket in the car, and he pointed the man (Mr. Schmidt) out to me and said he was a pickpocket; that's the words he used. He didn't order me to arrest him, but he told me he was a pickpocket, and naturally it was my duty to arrest such people as these. He said: 'Its the same man who jumped off the car a couple of nights before when Detective Schultz and Reynolds were in the car.' I was near him when he said it. We were right close together. The car was very crowded. This happened inside the car. The attention of the people in the car was attracted to the remark. There was a stampede in the car at the time. Everybody was excited, and everybody wanted to look at him, and naturally a policeman coming in the car made some excitement. There was a crowd in the street when I took Mr. Schmidt off. There was a crowd all night there. * * * When I put my hands on Mr. Schmidt and arrested him he was surprised. He said: 'These people are mistaken; you are making a mistake.'"

The plaintiff Schmidt testified that he rode on the car as far as Canal street, when he was taken off the car by a policeman. There was one at the front door and one at the rear, and they took him off the car. He was wondering why, so he sent to the front of the car and asked the conductor why he put him off. He looked at him awhile and then said: "Ain't you the man who jumped off the dashboard of this car the other night?" It was not long after that the car went off, the policeman took him down to Exchange alley and Customhouse street, and from

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there took him in the patrol wagon to the station. "The conductor said to the policeman: 'That's the man back there.' The policeman took the man back of me first, and the conductor said: 'Not him; the first one.'"—pointing to Schmidt himself. The policeman then took him off the car, and he walked with the policeman to the front of the car. The conductor was there with the motorman, and he asked him (Schmidt) whether he was not the man who had jumped over the dashboard the other night. There was a large crowd there. The attention of the passengers was attracted to the excitement. They saw the arrest. The whole crowd saw the conductor point him out to the policeman. The conductor said to the policeman: "Detective Schultz will know him."

The evidence shows that the officer Methe took plaintiff out of the rear end of the car and took him on the outside to the front of the car.

Mr. Abraham Beer testified that he was, at the time of the occurrence, at the corner of Royal street. He saw a car come up there and stop; the conductor saying that Mr. Schmidt was a pickpocket. "I heard him tell that to somebody. I saw the conductor tell the policeman, 'That's the man,' pointing to Mr. Schmidt. Mr. Schmidt and the conductor were on the back platform."

The witness Gillis testified that the policeman, after taking Schmidt from the rear end of the car, brought him to the front to the conductor, who was at that end. Mr. Schmidt wanted to know what was the matter with him, and the conductor said: "Ain't you the man who jumped off the dashboard the other night?" Mr. Schmidt said he was not, and some one (witness did not know who) said: "They will know all right." When Mr. Schmidt was arrested he said he was not guilty of any crime and would make them pay for putting him to that trouble and disgrace.

The defendant placed its inspector, Mr. Winters, on the stand, also Mossy, the conductor of car No. 61, and its second vice president, Joseph H. De Grange.

The former testified that Conductor Mossy had made complaint to him of larcenies committed on his car by pickpockets entering the same. He told the conductor he would take the information and give it to the police department. He accordingly rang them up by telephone, and they sent Detectives Schultz and Reynolds over to see him. He told them exactly what the conductor had told him. He told them to go and see the conductor. He did not give any instructions to the conductor or to any one else to arrest the men on the cars. The railways company did not give such instructions. The witness simply reported the matter to the police and left it to them to act. Witness did not tell the conductor to receive instructions from the police. He told him he would give the information to the police. Witness has no right to give instructions to the police department. They

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thanked him for the information. Witness asked them to go and see the conductor and get from him the information which he himself had received from him. He did this because there had been lots of complaints made in reference to thieves in the cars, and he thought it was no more than right that the company should protect the patrons of the street cars. He considered it was the duty of the company to protect the passengers against pickpockets by giving the information received to the police.

The inspectors were not instructed in particular in all such details, but he considered that the company owed the people of the city, if anything was wrong on the cars, that information should be given to the police. He considered it was part of his duty to give such information to the police.

Mr. De Grange, a vice president of the company, testified that the defendant company had never given any instructions to its conductors or motormen in regard to the arrest of the suspected people on their cars. On the contrary, they were forbidden to do any police duty.

If the conductor and motorman on this or any other car caused the arrest of a suspected person, they would have been unauthorized to do so by the company. They would have done it in direct disobedience of orders, because they have no police powers and are not authorized to make any arrests. When there are suspected persons operating on the cars, the company, for the purpose of protecting its patrons, notifies the police, calls their attention that such information had reached them, and asks them to do whatever they see fit to do. He did not consider it was one of the duties of his company to protect its passengers against loss through manipulations of pickpockets on the cars. The company protected them as well as it possibly could. It was the duty of the conductors to see that passengers reached their destination safely, as far as they possibly could; but there were a great many contingencies that they were unable to control.

Detectives Schultz and Reynolds were placed upon the stand. They testified to the fact that they had received information from Mr. Winters, the inspector of the defendant company, that Conductor Mossy had made a report to him that there were pickpockets working on his car, and he referred them to the conductor. They called upon the latter on his car and were told by him about it. They testified in reference to the occurrence on that car when one of the pickpockets jumped over the dashboard of the car and escaped. They asked the conductor on that occasion, if he saw any of the pickpockets that he knew, to give them a little tip on the quiet. There was an agreement with him that he should notify them when these parties whom he took to be pickpockets would get on his cars. On that particular occasion, when the car got near Poydras street, the conductor nodded to them. Immediately several men ran out of the car and escaped, as before stated. They instructed the conductor to point out thereafter to the police any of those people.

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Mossy testified to the same prior facts which the detectives have testified to. Touching the arrest of Mr. Schmidt, he said that he did not know him, but thought when he came on the car that he had seen him on the car with the three pickpockets who had escaped several nights before, and that he was one of them. He testified that on the night of plaintiff's arrest his car was "jammed" with people, and he asked the police corporal whether there were any detectives around, and he answered: "No; why?" And he (witness) said to him: "I think I have one of the thieves on the car. I would like you to put a detective on the car." The first thing, he opens the gate, walks in, and he says: "Is this one of the men?" Witness said, "I think so," and "he lugged the man off." Witness asked for a detective to watch the man. His purpose was to have the detective watch him and see if he did anything. He did not tell the policeman to arrest him. He had never received any instructions from Inspector Winters or any other of the officers of the company to make any arrest or cause the arrest of anybody on the car. He never gave any instruction to arrest any one. Witness simply asked the police if there was a detective there in citizen's clothes, so he might get on the car and see if the man he suspected did anything wrong.

Mr. Schmidt resembled one of the men from the size and everything else. He denied positively having pointed out Mr. Schmidt to the policeman saying, "Officer here is a pickpocket in the car;" denied having made the statement that "Mr. Schultz would know;" denied having asked Mr. Schmidt whether "he was not one of the men who had jumped off the car," or having spoken to him at all; denied having been at the front end of the car at all; denied having seen the officer arrest Mr. Schmidt. It was a police corporal who arrested him, not Officer Methe.

In the brief filed on behalf of the defendant it is urged that:

"The master is never liable for the willful and malicious acts of the servant committed outside of the scope of his employment. On such a state of facts, therefore, a master cannot be held responsible, where the servant makes or causes a false arrest or false imprisonment." Citing A. & E. Enc. of Law, vol. 20, p. 174; 6 Exch. 314; L. R. 5 C. P. 640; L. R. 2 Q. B. 534; 7 Exch. 36; L. R. 5 C. P. 445; 6 Canada Sup. Ct. 532; Little Rock Traction & Electric Co. v. Walker, 65 Ark. 144, 45 S. W. 57; Tolchester Beach Imp. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846; Carter v. Howe Mach. Co., 51 Md. 290; Barabasz v. Kabat, 86 Md. 23, 37 Atl. 720; Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63; National Bank of Commerce v. Baker, 77 Md. 462, 26 Atl. 867; Mulligan v. Railway Co., 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539; also, Ware v. Baratania & L. Canal Co., 15 La. 169, 35 Am. Dec. 189; Gerber v. Viosca, 8 Rob. 150; Civ. Code, art. 2320; Williams v. Palace Car Co., 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512; Dyer v. Reely, 28 La. Ann. 6; Lafitte v. Railroad Co., 43 La. Ann. 34, 8 South. 701, 12 L. R. A.

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337; McDermott v. Am. Brewing Co., 105 La. 124, 29 S. 498, 52 L. R. A. 684, 83 Am. St. Rep. 225.

We do not think that the conductor was in this case malicious. On the contrary, though acting erroneously, carelessly, and to the great injury of the plaintiff, his acts were in the line of discharge of his duty to his employers and in their supposed interest, and not his own. The railway company by reason of its act of incorporation came under certain obligations for the safety and protection of the public and particularly of its passengers, and it had for that purpose to act through employees for whom it in that regard is assumed responsible.

The conductor of the street car represented in this instance the street railway company. The company could not free itself from the obligations referred to by failing to give its conductors full and proper instructions, or by restricting the limit and extent of their authority so as to disable them from properly performing duties which it was inherently necessary and essential that they should have in order to carry out to the extent of legal requirements the functions of the position in which they were placed. It could not, by merely enjoining upon the conductors to perform their duties cautiously, prudently, and well, break the effect of their failure to comply with these injunctions, nor could it, by throwing its instructions in the form of prohibitory orders, alter the legal scope of their power, duties, and authority.

These are matters which it cannot lessen and make to fail below the limits affixed to the positions themselves by operations of the law itself.

The conductor in the case before us did not himself arrest the plaintiff, but it was through his instrumentality that the latter was arrested in, and ejected from, the car in which he was a passenger, by a policeman, and taken to the police station through the streets in a patrol wagon as a prisoner. The conduct of the policeman was the direct and natural consequence of the course pursued by the conductor. Article 2324 of the Civil Code declares that he who causes another person to do an unlawful act or assists or encourages in the commission of it is answerable in solido with that person for the damage occasioned by that act. It was held in *Dickson v. Waldron* (Ind. Sup.) 35 N. E. 1, that, where a person selected and paid by the proprietor of a theater is, at the request of the latter, appointed a special policeman for that theater, and under the direction of the proprietor's ticket agent makes a wrongful arrest, the proprietor will be liable.

We do not underrate the difficulties in which railroad companies are placed by the heavy responsibilities thrown upon them by the law, but these responsibilities they voluntarily assume as being compensated by the privileges conferred by the state. Being assumed, they must be met.

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

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CLARK v. DURHAM TRACTION CO.

(Supreme Court of North Carolina, April 11, 1905.)

[50 S. E. Rep. 518.]

Passengers—Injury to Person Boarding Street Car—Sudden Jerk.*
 Plaintiff alighted from a street car, on which he had paid his fare, received a transfer to a connecting line. As he attempted to board the connecting car at the usual place for the transfer of passengers, he was thrown to the street and injured by the sudden start of the car when he had one foot on the step and the other on the ground. Held, that plaintiff was a passenger at the time he was injured.

Injury to Passenger—Negligence of Conductor—Premature Start.—Where plaintiff was injured by the sudden starting of a street car before he had succeeded in boarding it at a regular stopping place, and appeared that at the time the conductor was not at his post of duty controlling the movements of the car, an instruction that such facts, if believed, were sufficient to establish the street car company's negligence was not error.

Duties to Boarding Passengers.†—It is the duty of a street car conductor to be at his station on the platform where passengers are in the habit of boarding the car, and to give them such assistance as is necessary, and see that the motorman is not signaled to start until reasonable time has been given passengers assembled, who manifested an intention to get on the car, to do so.

Damages.—In an action for injuries to a passenger by the premature starting of a street car, an instruction authorizing a recovery of damages for actual nursing, medical expenses, and "loss of time, or loss from inability to perform ordinary labor or capacity to earn money," was proper.

Appeal from Superior Court, Durham County; Bryan, Judge.

Action by W. Y. Clark against Durham Traction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is a civil action tried before his honor Judge Bryan in the superior court of Durham county for the recovery of damages for injury by the negligence of the defendant. The court submitted the following issues: "(1) Was the plaintiff injured

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to Chicago & A. R. Co. v. Walker (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to Illinois Cent. R. Co. v. Proctor (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

†See foot-notes appended to Foster v. Seattle Elec. Co. (Wash.), 12 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; foot-note appended to Sharp v. New Orleans City R. Co. (La.), 11 R. R. R. 668, 34 Am. & Eng. R. Cas., N. S., 668.

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by the negligence of the defendant, as alleged in the complaint? Ans. Yes. (2) If so, did the plaintiff, by negligence on his part, contribute to said injury? Ans. No. (3) What damages, if any, is plaintiff entitled to recover? Ans. \$500." From the judgment rendered, the defendant appealed.

Manning & Foushee, for appellant.

Winston & Bryant, for appellee.

BROWN, J. The first proposition which is prevented by several of the exceptions of the defendant brings up the question as to whether or not the plaintiff was a passenger on the defendant's line at the time of the injury sustained by him. The court charged the jury, if they believed the evidence in the case to be true, to find that the plaintiff was a passenger. In this instruction we see no error. The only testimony upon this point is that of the plaintiff himself and the testimony of the defendant's witness Sorrell. We see nothing in the testimony of the latter tending to contradict the statement of the plaintiff as to his relation to the defendant company at the time of the injury. The plaintiff stated that he boarded the street car of the defendant in East Durham, paid his fare, received a transfer for the Main Street Line, and was brought to the Mangum street connection; got off at the crossing of Main and Mangum streets for the purpose of boarding the other car, and attempted to do so. The car stopped at the usual place for the transfer of passengers. Two men preceded him, and boarded the car successfully. Plaintiff followed immediately behind, got hold of the rod on the west side of the vestibule at the end of the car with his right hand, and put his foot on the steps of the car. Before he got his weight entirely on the car, it started. At that time he had his right foot on the steps of the car and his right hand on the vestibule rod. No warning was given. The conductor was not present at that end of the car. Plaintiff says he saw the conductor sitting close to a young lady. No one helped him on the car. The car started suddenly, and jerked the plaintiff down on the pavement. These uncontradicted facts, we think, justify the court in charging the jury that, if they believed them to be true, plaintiff was a passenger on the defendant's line. It is the settled law in this state, so far as steam railroads are concerned, that when a person comes upon the premises of a railroad company at the station, and has a ticket, or with the purpose of purchasing one, he becomes thereby a passenger of the company. *Tillett v. Railroad*, 115 N. C. 665, 20 S. E. 480; *Seawell v. Railroad*, 132 N. C. 859, 44 S. E. 610. The authorities in other states, where electric lines are more extensively operated than in this, all go to show that the same principle is applied to the operation of surface railroads whether operated by steam or electricity. The plaintiff had purchased a ticket—that is to say, he had paid his fare, and had boarded defendant's line in East Durham—and while on the car had received a transfer from one portion of the line to another.

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He got off at the usual place where passengers alight for the purpose of boarding the other car. The Mangum street car, which the plaintiff desired to board, stopped for the purpose of taking on passengers. Plaintiff, with his transfer in his pocket, approached the car with two other passengers, and at the time of the injury had one foot upon the steps of the car and his right hand hold of the rod. These facts plainly make him a passenger. Mr. Joyce, in his work on Electric Law, § 528, says: "A passenger on a street railway is a person whom the company has undertaken to carry by virtue of a contract, express or implied. To create the relation of carrier and passenger it is not necessary for one to have entered the car, but the relation may exist before a person has actually boarded a car." It has been held in several cases where a person had obtained a transfer ticket from one car which entitled him to ride on another car of the defendant company, and he had approached the car, standing to receive passengers, when the car started, and he was thrown to the ground, that such person is a passenger. *Washington & G. Ry. Co. v. Patterson*, 9 App. D. C. 423; *St. Ry. Co. v. Kaspers*, 85 Ill. App. 316; *Keator v. Traction Co.*, 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758. The person, in transferring from one car to the other, is still a passenger; the transfer being but a part of the trip, for the whole of which the company agrees to convey in safety.

Was the defendant company guilty of negligence? His honor instructed the jury if they believed the evidence to answer that issue "yes." In this instruction we are likewise unable to discover any error. The evidence in the case was practically undisputed, and we do not see how any reasonable mind can draw more than one inference from it. In addition to what we have already quoted from the plaintiff's testimony, he testified that when he put his right foot on the steps of the car, and before he got his weight on his foot, the car started. No warning was given. He was jerked on the pavement. His shoulder was hurt, his leg was twisted and knee hurt, and he was dragged 8 or 10 feet before he got loose. The car then ran 50 or 100 feet, and then came back. No one helped him on the car. The conductor was not on the platform. After he was hurt he took the car, and went on to his destination. After he reached home he went to bed, and stayed four or five weeks. He suffered great pain, and has used crutches ever since. Sent for the doctor. He further testified that before he was hurt his condition was as good as most men of his age. That he is 84 years old. That he did not use crutches before his injury, but had walked with a cane for 25 or 30 years. That he was on the west side when the car came up, and motioned his hand to the motorman. Did not hear any bell. As he took hold of the handle of the car, it started. He testified that Mangum street is a regular stopping place for the transfer of passengers. We see nothing in any of the testimony for the defendant which at all tends to contradict or modify in any way the plaintiff's

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testimny. Inasmuch as only one inference can be drawn therefrom, it was plainly the duty of the judge to instruct the jury as he did. Clark's Code (3d Ed.) 531; Chesson v. Lumber Co., 118 N. C. 67, 23 S. E. 925. When the car stopped for the purpose of receiving passengers either from the street or those transferred from other cars, it was plainly the duty of the conductor to be at his station on the platform where passengers are in the habit of boarding the car. It was his duty to give them such assistance as was necessary in getting on and off the car, and to see to it that the motorman was not signaled and the car not started until reasonable time had been given the passengers there assembled, who manifested an intention, to get on the car. The authorities show that if a street car has stopped for the reception of passengers, or if an intending passenger has signaled it to stop, and has put his foot upon the step of the car in the act of getting on, and is injured by a sudden starting, he will have the right to damages for his injury, whether the servants who started the car knew that he was in the act of getting on or not. Such person is entitled to the care due a passenger, and it is the conductor's duty to know before he starts his car whether any person is in the act of getting on or not. If the conductor is busy, it is not enough for him to wait a reasonable time for passengers to board the car, but it is his plain duty to look and see that intending passengers are safely on board before signaling the motorman to start. Thompson's Law of Negligence, § 3514; Clark's Street Railway Accident Law, page 54; Cohen v. Ry. Co., 60 Fed. 698, 9 C. C. A. 223. In the latter case it is said: "The conductor of street cars is bound to know, when he starts his car suddenly and with full force, that no person attempting to embark is at that moment with one foot on the platform and the other on the ground, and with his hand upon the railing, in the act of getting on board, or is otherwise in a position of danger." The adjudicated cases fully supported the views of the eminent text-writers above cited. Dudley v. Cable Co. (C. C.) 73 Fed. 129; Terminal Co. v. Morris (Va.) 44 S. E. 720; Akersloot v. Ry. Co. (N. Y.) 30 N. E. 195, 15 L. R. A. 489. In Akersloot v. Ry. Co., *supra*, the New York court says: "The conductor of a street car must see that a passenger entering the car is in a place of safety before he gives the signal to proceed, and the passenger is entitled to damages if he is thrown down and injured by the premature starting of the car." "It is the duty of a conductor, before giving the signal to start, to look around and see that all passengers to take passage at that place are safely on board, and failure so to do is not excused by the fact that he does not see an intending passenger. The passenger has a right to rely upon the care and protection of the company's employees, and he is not bound to prepare for, or even anticipate, a sudden and unexpected start of the car which may throw him upon the ground." Nellis on Street Surface Railways, p. 461. The authorities are all to the effect that a degree of attention beyond that due to ordinary passengers

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should be bestowed on those affected with a disability by which the hazards of travel are increased. The sick, the lame, children, and aged persons are entitled to more care and attention from those in charge of a car than those in full possession of their strength and faculties. They should be allowed more time in which to get on and off the car and to secure a safe position therein. *Sheridan v. Ry. Co.*, 36 N. Y. 39, 93 Am. Dec. 490; *Wardle v. Ry. Co.*, 35 La. Ann. 202; Booth on Street Railways, § 330. These authorities seem to settle the question beyond any doubt that the plaintiff was not only a passenger upon the defendant's line, but that, if the evidence is believed to be true, he was injured by the negligence of the defendant's employees, and therefore is entitled to recover damages for his injury.

His honor instructed the jury that: "In this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent act. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury." The defendant excepted to the words, "these are understood to embrace loss of time or loss from inability to perform ordinary labor or capacity to earn money." This instruction seems to be a verbatim quotation from *Sutherland on Damages*, vol. 3, p. 261, and is fully sustained by the numerous authorities there cited. It is also approved in totidem verbis in *Wallace v. Railroad*, 104 N. C. 452, 10 S. E. 552.

Upon a review of the whole case and all of the exceptions, we are of opinion that there is no error, and that the judgment should be affirmed.

DAVIS *v.* CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky, March 29, 1906.)

[92 S. W. Rep. 339.]

Carriers—Who Are Passengers—Express Messengers.*—An express messenger, carried in a special car under a contract of the carrier with the express company for transportation of express matter, is a passenger for hire.

Same—Injuries to Passengers—Release of Liability—Validity.†—Under Const. § 196, and Code Va. 1887, § 1296, prohibiting carriers from contracting away their common-law liability, a Virginia contract, whereby an express messenger at the time of his employment released all claims against the express company or against the carrier for injuries he might receive, whether through negligence or otherwise, was void, so as not to affect his right to recover for injuries received in Kentucky.

Appeal from Circuit Court, Greenup County.

"To be officially reported."

Action by John A. C. Davis against the Chesapeake & Ohio Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Davis & Mathews, Scott & Dinkle, and D. C. T. Davis, Jr., for appellant.

Worthington & Cochran and W. H. Wadsworth, for appellee.

PAYNTER, J. The appellant, Davis, was employed by the Adams Express Company as a messenger. Under a contract which the Adams Express Company had with the appellee, his

*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

For the authorities in this series on the subject of the relation of express agents and messengers to railroad companies, see foot-notes appended to *Harvey v. Louisiana Western R. Co.* (La.), 16 R. R. R. 573, 39 Am. & Eng. R. Cas., N. S., 573.

†For the authorities in this series on the question whether a carrier of passengers can limit its liability, see foot-note appended to *Yazoo & M. V. R. Co. v. Grant* (Miss.), 18 R. R. R. 257, 41 Am. & Eng. R. Cas., N. S., 257; foot-notes appended to *Sprigg's Adm'r v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-note appended to *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603.

For the authorities in this series on the subject of transitory actions and the extraterritorial effect of constitutional provisions and statutes, see foot-notes appended to *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 18 R. R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542; foot-note appended to *Kansas City S. Ry. Co. v. McGinty* (Ark.), 17 R. R. R. 71, 40 Am. & Eng. R. Cas., N. S., 71; *Raisor v. Chicago & A. R. Co.* (Ill.), 16 R. R. R. 96, 39 Am. & Eng. R. Cas., N. S., 96.

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duties required him to go upon appellee's trains to look after packages and property which it was transporting under its contract with the express company. While on one of appellee's trains in the discharge of his duties he was injured by the alleged negligence and carelessness of appellee. The principal defense relied on is a contract of release which the Adams Express Company required the appellant to execute upon entering its service. The preamble of the contract recites that he had applied to the express company for employment as a servant at a fixed compensation; that his duties were to take charge of goods which the express company transported upon cars and other conveyances of railroad companies; that the railroad companies required of the express company, as a condition of their permitting messengers to travel upon their trains in the performance of duties, that they should be indemnified and released from all liability for and in respect of any damage or injury which might be sustained by him in the course of his employment, whether the same be occasioned by the negligence of the railroad company or otherwise. The contract of release contains the following stipulations: "Now, therefore, in consideration of such employment to be given by the said express company, and the compensation to be paid therefor, and in consideration of \$1, lawful money of the United States of America, paid by the Adams Express Company to the undersigned, the receipt whereof is hereby acknowledged, the undersigned for himself, his heirs, executors, administrators, and assigns, hereby fully consents to and ratifies each and every bond or other instrument or contract of indemnity against such liability, and each and every release of said liability or other similar contracts executed and to be executed by the said express company to any railroad or other carrier, and the undersigned agrees to assume all risks of death or accident, or damage to him, or to his or any of his property, and does hereby release and discharge said Adams Express Company and any connecting carrier, railroad company, express company, or other company or person or connecting carrier in whose car or other conveyances he may travel in the performance of his duties as aforesaid, from any and all claims, liabilities, and demands of every kind, nature, and description, for or on account of his death or any injury or damage to his person or property of any kind or nature sustained by the undersigned, whether caused by the negligence of the said Adams Express Company, or any of said railroad companies or other carriers or otherwise." The contract was executed in Virginia, and the injury of which he complains was received in Kentucky. The court below held that the contract was enforceable, hence appellant's right to recover was denied.

For the appellant it is urged that the contract is against public policy and is declared invalid both by the Code of Virginia and also, by section 196 of the Constitution of Kentucky, for each denies the right of a common carrier to contract for relief from common-law liability. For the appellee it is insisted that the rule

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of public policy which renders invalid stipulations by common carriers restricting their liability for loss occasioned by their negligence does not apply when they engage to do some thing which it is not under obligation as a common carrier to do, and that when it enters into a contract as a private carrier for hire, it may exempt itself, by contract, from liability for its negligence, or that of its servants or agents. While there is some conflict in the authorities on the question, we are of the opinion that the courts which hold that an express messenger though carried in a special car, under a contract with the express company for transportation of express matter, announce the correct doctrine in holding that they are passengers for hire. The sum which the express company pays the railroad company for conducting its express business, on its cars, over its line of railway is necessarily, in part, for the transportation of the express messenger. The express messenger is not a trespasser, because he is being transported by the railroad company under a contract and for the same reason he is not a licensee. He is an employee of the express company and not of the railroad company. If he is not a trespasser or a licensee, or an employee of the railroad company, he must necessarily be a passenger. While the railroad company could not be compelled to enter into a contract by which it would receive into the express car the messenger of the express company and thus transport him, still when he does agree to, and does receive him on that car for transportation, though his business is to look after express matter, he is being transported for compensation, hence, as a passenger for hire. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Blair v. Railroad Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Brewer v. Railroad Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647; *Kenney v. Railroad Co.*, 125 N. Y. 422, 26 N. E. 626; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Railroad Co. v. Thomas' Adm'r*, 79 Ky. 169, 42 Am. Rep. 208; *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Railroad Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550; *Chamberlain v. Railroad Co.*, 11 Wis. 238; *Railroad Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345.

It is said in *Hutchinson on Carriers*, § 564: "It seems that if the person who is injured by the negligence of the employees of the carrier, is lawfully upon its conveyance, under a contract which does not make him an employee or servant of the company, he will be entitled to the same care and diligence for his safety as one who is strictly a passenger. Thus where one was upon a train as an express messenger, carrying express freight, under contract with the company, by which he was entitled to be carried, without a distinct price for his passage, and was injured by the negligence of the company's agents in the management of the train, or in putting obstructions in its way, it was held that such messenger was entitled to the same care and circumspection on

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the part of the company and its agents in his carriage as if he had been traveling upon the train as a passenger, who had paid a distinct price for his transportation." In 3 Thompson on Negligence, § 2651, it is said: "In respect of the measure of duty which the carrier owes him and his right of recovery for an injury happening through the negligence of the carrier's servants, an express messenger stands on the same footing as a U. S. postal clerk. He is on the carrier's vehicle lawfully, and for a consideration paid the company, and his legal rights are therefore those of a passenger for hire." In section 1578, vol. 4, Elliott on Railroads, it is said: "The courts have held the relation of carrier and passengers to exist in cases of mail agents, or postal clerks, and a similar rule is declared as to express messengers."

In the case of *Kentucky Central R. R. Co. v. Thomas' Adm'r*, 79 Ky. 163, 42 Am. Rep. 208, the party killed by the railroad accident was an express messenger and the court in speaking of the relation he sustained to the railroad company said: "That the intestate was a passenger and entitled to the privileges and subject to the duties incident to that relation, is not disputed." In the case of *Louisville & Nashville R. R. Co. v. Kingman*, 35 S. W. 264, 18 Ky. Law Rep. 82, this court held that a postal clerk carried by a railroad company, under its contract with the government, is to be treated as a passenger, as regards the liability of the company for injuries received by him while being thus carried.

Having concluded that an express messenger is a passenger for hire, the question remains: What effect has the contract in question upon his claim for damages resulting from the alleged negligence of the appellee? Section 1296 of the Virginia Code of 1887 reads as follows: "No agreement made by a common carrier for exemption from liability, for injury or loss, occasioned by his own neglect or misconduct shall be valid." Section 196 of the Constitution of Kentucky reads as follows: "No common carrier shall be permitted to contract for relief from its common law liability." Thus we have a declaration from the state of Virginia, through its Legislature, and the state of Kentucky, through its organic law, as to their public policy with reference to the right of a common carrier to contract for relief from its acts of negligence. Under the Virginia Code, a common carrier cannot contract for exemption from liability for injury or loss occasioned by its negligence or misconduct. Neither under the Virginia Code nor the Constitution of this state is the contract in question enforceable, if it is an effort upon the part of appellee to be relieved thereby of liability, to a passenger for hire, who is alleged to have been injured by its negligence, or that of its agents or servants. Before the enactment of the Virginia Code and the adoption of the constitutional provision of this state, such a contract would not have been valid at common law in either state. From the nature of the business of the Adams Express Company and the duties to be performed by its messengers, and the fact that the appellee conducted an interstate business, shows that the

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parties attempted to relieve themselves from liability for negligent acts whether they occurred in Virginia or Kentucky.

So the parties to the contract contemplated that it should operate both in Virginia and Kentucky, and in any other state through which the carrier ran and express matter was carried. The alleged negligent act was committed in Kentucky, therefore, the cause of action arose in this state, and the appellee is relying upon a contract that was to operate in Virginia as well as Kentucky, for relief against its alleged negligent act. In the case of *C., C., C. & St. L. Ry. Co. v. Druen*, 80 S. W. 781, 26 Ky. Law Rep. 108, 66 L. R. A. 275, the court had under consideration the question as to the effect of a contract made in another state and to be performed, in part, in this state and which if made in this state would have been against public policy, and the court said: "But as to that part of the contract that is to be performed in Kentucky, it will be read in the light of the laws and Constitution of this state, and be construed and applied accordingly. It will be conclusively presumed that the parties so intended, and that, therefore, the provision limiting the carrier's common-law liability was not intended to apply to that part of the shipment that was to be performed here, for the court will not presume that the parties intended either a vain, or illegal thing. That contracts to be performed partly in two states will be construed according to the laws of each of the states relating to the portions to be performed there respectively, is sustained in *Bishop on Contracts*, § 1394. If shipper and carrier by entering into the contract beyond this state, would incorporate binding provisions in it, limiting the duties and liabilities of carriers in this state, notwithstanding the prohibition of the Constitution, it would be to put the bargains of individuals above the organic laws, and to substitute them to that public policy exercised by the state for the best welfare of the whole people of an organized society. This they ought not, and will not, be permitted to do." Our conclusion is that the contract is not only against the public policy of Virginia, but also of Kentucky. If it were valid under the Virginia Code, it would not be valid here, because the cause of action arose in this state, and the contract was intended to relieve the appellee from its negligent act in Kentucky.

We will consider briefly the claim of appellee, that in contracting to haul the messenger and goods of the express company, it was not contracting as a common carrier, but as a private carrier. This position is sustained by the case of *B. & O. R. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, and the opinions of courts in some other jurisdictions. It may be true (but the question is not before us) that an express company could not compel railroad companies to provide an express car for the transportation of its messengers and packages, but having made the contract and proceeds to execute it by transporting the messenger and its packages, does not deprive it of its character as a common carrier. It carries the messenger and packages for hire.

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The railroad company is a common carrier by virtue of the business it conducts, and not by virtue of the responsibilities which may be placed upon it by law, or its contracts. The mere fact that it makes some special arrangement with some person or company for the transportation of persons, or property, over its line, in a particular way or under certain conditions, does not deprive it of its character as a common carrier, or convert it into a bailee for hire. The case of *Greenwich Ins. Co. v. Louisville & Nashville R. R. Co.*, 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313, is not in conflict with the conclusion we have reached. There, the contract under consideration was not for the transportation of passengers or goods, but was a contract by the railroad company giving its permission to the erection of a building upon its right of way, upon certain conditions, hence, the court held the contract was not made with reference to its business as a common carrier. In the case of *Railroad Co. v. Lockwood*, 17 Wall. 359, 21 L. Ed. 627, the question arose as to the liability of the railroad company to a drover, who under a special arrangement rode upon a freight train to look after stock which was being carried thereon. The contract with the drover provided that the carrier was not to be liable to him for injuries resulting from its negligence, and the court said: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character, and becomes an ordinary bailee for hire, and therefore may make any contract he pleases; that is, he may make any contract whatever, because he is an ordinary bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God, or public enemies. The civil law excepts also losses by means of any superior force, and any inevitable accidents. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced that a special contract as to the terms and responsibilities of carriers, change the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, while the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the

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latter assumes risks of inevitable accidents in the carriage of his goods? Suppose that the contract relates to single crate of glass or crockery, while at the same time the carrier receives from the same person 20 other parcels, respecting which no such contract is made, is the company a public carrier as to the 20 parcels, and a private carrier as to the one? On this point there are several authorities which support our view, some of which are noted in the margin. A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation, or special engagement, he undertakes to carry some thing which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regular established business for carrying all of certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibilities does not divest it of the character."

The drover in this case could have compelled the railroad company to have accepted his fare, and transported him on its passenger trains as a passenger, and the mere fact that it agreed to do so on a freight train, did not deprive him of his relation to the railroad as a passenger. The express messenger could have compelled the railroad company to have accepted fare and transported him upon a passenger train. The mere fact that it did so in the express car did not deprive him of his relation to the railroad company as a passenger entitled to all the relief which the law guaranteed him. In the case of *B. & O. S. W. Ry. Co. v. Voight*, the Supreme Court endeavored to distinguish that case from *Railroad Co. v. Lockwood*. In our opinion the reasoning in the *Lockwood Case* applies with great force to the case under consideration. Several of the Supreme Courts of the states have taken the view of the law that we have herein expressed. In our opinion, the contract under consideration is against public policy, and not enforceable.

The judgment is reversed for proceedings consistent with this opinion.

WEEKS v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, March 2, 1906.)

[77 N. E. Rep. 654.]

Evidence—Expression of Present Pain.*—In an action against a street railway for injuries to intestate evidence that after the injury, deceased, in riding one day in her own carriage “spoke about how hard it rode,” and said that “it seemed as though her carriage never rode so hard before,” was admissible as an expression of then present pain or weakness.

Trial—Cumulative Evidence—Declaration of Deceased.—Under St. 1898, p. 522, c. 535, now Rev. Laws, c. 175, § 66, providing that a declaration of a deceased person shall not be inadmissible in evidence as hearsay, if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant, the fact that in an action against a street railway for injuries to plaintiff's intestate while a passenger on defendant's car, a daughter of deceased had testified to a conversation with her mother in which the latter described the accident, did not preclude another daughter from testifying to a similar conversation with deceased.

Carriers—Injuries to Passenger—Contributory Negligence.†—In an action against a street railway for injuries to plaintiff's intestate caused by the sudden starting of defendant's car with a jerk, thereby throwing intestate down, the fact that after deceased entered the car she walked up the aisle five or six feet before the car started, did not preclude the jury from finding that in proceeding towards the front of the car decedent was exercising ordinary care, even if she did pass an empty seat which she could have taken.

Same—Negligence.‡—On the issue as to the negligence of a street railway in starting one of its cars suddenly, thereby injuring a passenger who had entered the car, the question of the negligence of defendant's conductor in giving the signal to start was to be considered with reference to his duty to such passenger, and not to another passenger still on the steps of the car.

Same.‡—Where plaintiff's intestate, a strong, healthy woman be-

*For the authorities in the series on the question of the admissibility of evidence of expressions of pain on the part of the injured person in negligence cases, see foot-notes appended to *McCormick v. Detroit, etc., Ry. Co.* (Mich.), 17 R. R. R. 516, 40 Am. & Eng. R. Cas., N. S., 516; foot-notes appended to *Birmingham Ry. L. & P. Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; foot-notes appended to *Kansas City, etc., R. Co. v. Mathews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79; *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444.

†For the authorities in this series on the subject of the contributory negligence of passengers in standing up in cars, see foot-notes appended to *Shamblin v. New Orleans & N. W. R. Co.* (La.), 16 R. R. R. 528, 39 Am. & Eng. R. Cas., N. S., 528.

‡For the authorities in this series on the subject of the carriers'

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tween 58 and 60 years of age, showing no sign of physical or mental infirmity, had entered defendant's street car, and was proceeding to her seat in the usual way, defendant's conductor was under no obligation to wait until she had become seated before giving the signal to start.

Same—Obligation to Notify Passenger of Signal to Start.—Nor was defendant's conductor bound to notify plaintiff's intestate that he was about to give the signal to start the car.

Exceptions from Superior Court, Suffolk County; William Cushingwait, Judge.

Action by one Weeks, administrator, against the Boston Elevated Railway Company. Verdict for plaintiff. Exceptions by defendant. Exceptions sustained.

Personal injury—passenger thrown down by car starting. This was an action of tort for personal injuries to one Elizabeth J. Glidden, who, after she had entered a car of defendant and had proceeded several feet down the aisle, was thrown to the floor by the starting of the car. In the superior court there was a verdict for plaintiff, and defendant excepted.

Chas. W. Bartlett, E. R. Anderson, and Arthur T. Smith, for plaintiff.

M. F. Dickinson and Walter Bates Farr, for defendant.

HAMMOND, J. 1. The various statements as to the complaints of the deceased as to pain were rightly admitted. They do not appear to have been a narration of past pain, but only such exclamations or expressions as usually and naturally accompany and manifest the existence of present pain. *Bacon v. Charlton*, 7 Cush. 581; *Hatch v. Fuller*, 131 Mass. 574; *Cashin v. New York, New Haven & Hartford Railroad*, 185 Mass. 534, 70 N. E. 930. The same consideration disposes of the exceptions to the evidence that the deceased, in riding one day in her own carriage from the doctor's office to her house, "spoke about how hard it rode," and said that "it seemed as though her carriage never rode so hard

duties to boarding passengers, see foot-notes appended to *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; foot-notes appended to *Talbert v. Charleston & W. C. Ry. Co.* (S. Car.), 17 R. R. R. 53, 40 Am. & Eng. R. Cas., N. S., 53; foot-note appended to *Redington v. Harrisburg Traction Co.* (Pa.), 16 R. R. R. 600, 39 Am. & Eng. R. Cas., N. S., 600; *Hatch v. Philadelphia & R. Ry. Co.* (Pa.), 16 R. R. R. 586, 49 Am. & Eng. R. Cas., N. S., 586.

For the authorities in this series on the subject of the liability of a carrier for injuries to passengers from jerks or jolts of trains or cars, see foot-notes appended to *Southern Ry. Co. v. Cunnigham* (Ga.), 18 R. R. R. 374, 41 Am. & Eng. R. Cas., N. S., 374; *Chicago City Ry. Co. v. McCaughna* (Ill.), 18 R. R. R. 262, 41 Am. & Eng. R. Cas., N. S., 262; foot-notes appended to *Conroy v. Detroit United Ry.* (Mich.), 16 R. R. R. 671, 39 Am. & Eng. R. Cas., N. S., 671; foot-notes appended to *Andrews v. Yazoo & M. V. R. Co.* (Miss.), 16 R. R. R. 587, 39 Am. & Eng. R. Cas., N. S., 587.

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before." This may well be regarded as an expression and indication of then present pain or weakness.

2. After a daughter of the deceased had testified to a conversation with her mother, in which the latter described the accident, another daughter was allowed to testify to a similar conversation with her mother. To the admission of this last conversation the defendant objected upon the ground that St. 1898, p. 522, c. 535, now Rev. Laws, c. 175, § 66, under which the evidence was admitted, did not contemplate that more than one statement of the deceased person should be admitted, and that to allow evidence of another similar statement would have the effect of corroboration of the first statement made by the deceased, or, in other words, would result in a duplication or multiplication, as the case might be, of the deceased as a post mortem witness. For reasons too obvious to require a statement of them, this interpretation of the statute cannot be adopted.

3. The facts as to the circumstances of the accident are not much in dispute. The plaintiff's intestate, Mrs. Glidden, with her sister, Mrs. McLaughlin, signaled for the car to stop. It stopped, and when the former had entered the car and proceeded up the passageway five or six feet, and while the latter was still upon the platform, the car started. The evidence warranted a finding that the conductor, who was standing upon the rear platform with both women in full view, gave the signal for the car to start; that it suddenly started with a violent and unusual jerk, by which Mrs. Glidden, who was still standing, was thrown over backwards upon the floor of the car and injured. There were several passengers in the car, and it does not appear that it was necessary for the plaintiff's intestate to go so far into the car before finding a seat; but the jury may have properly found that in proceeding towards the front of the car she was exercising ordinary care even if she did pass an empty seat which she could have taken. Upon this branch of the case the instructions were sufficiently favorable to the defendant.

It is argued by the plaintiff that the conductor was negligent. In considering this question it is to be noted that we are to consider his duty, not to Mrs. McLaughlin who was still upon the step, but to the plaintiff's intestate who was well inside the car. The latter is described as a strong, healthy woman at the time, between 58 and 60 years of age, showing no sign of physical or mental infirmity, and the conductor had no reason to suppose, and there was no reason to suppose, that she was other than an ordinarily careful and capable passenger. As to her we do not think that the conductor can be said to have been negligent. The woman was well inside the car, was proceeding to her seat in the usual way, and we do not think that the conductor was under any obligation to wait until she had become seated before giving the signal to start. Nor was he bound to notify her that he was about to give the signal. The second and third requests were therefore correct in law.

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One of the grounds of complaint was that the conductor was negligent by giving too soon the signal to start, and the case went to the jury authorizing them to find for the plaintiff if they found the conductor negligent in that respect; and, for aught that appears, the verdict for the plaintiff may have been rendered upon that ground. Under the circumstances, the failure to give the second and third requests was error prejudicial to the defendant. Exceptions sustained.

WOLFE v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia, Jan. 13, 1906.)

[53 S. E. Rep. 239.]

Carriers—Separation of White and Colored Passengers—Mistake of Conductor.*—If it be actionable per se, as against a street railway company, for its conductor, in endeavoring to comply with the statute requiring the separation of white and colored passengers, to negligently mistake a white passenger for a colored one, and in the presence and hearing of others inform him that he must be seated in the portion of the car set apart for negro passengers, it is essential to the maintenance of such an action that the petition allege the plaintiff to be a white man. The petition in the present case not containing such necessary allegation, it was properly dismissed on general demurrer.

Cobb, P. J., and Evans, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Nathan F. Wolfe against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an action for damages against a street railway company. The petition was dismissed on general demurrer, and the plaintiff excepted. The plaintiff's case, as made by his petition, is substantially as follows: On a day stated the plaintiff, accompanied by his sister, boarded a car of the defendant at a designated point in the city of Atlanta, for the purpose of being transported to another point reached by the lines of the defendant company. He paid the conductor the required fares for himself and his sister, and asked for and received transfers to the line

*For the authorities in this series on the subject of the duty to separate white and colored passengers, see foot-notes appended to *Southern Light & Traction Co. v. Compton* (Miss.), 18 R. R. R. 269, 41 Am. & Eng. R. Cas., N. S., 269; *Choctaw, etc., R. Co. v. State* (Ark.), 16 R. R. R. 545, 39 Am. & Eng. R. Cas., N. S., 545; *Commonwealth v. Louisville & N. R. Co.* (Ky.), 16 R. R. R. 91, 39 Am. & Eng. R. Cas., N. S., 91.

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which would take him to his destination, and at the proper transfer point he boarded a car on this line. The car to which he and his sister were transferred had two long seats, one on each side of the car, with a broad aisle between. Plaintiff and his sister entered the car from the rear, walked forward, and seated themselves in the front part of the car. Under the laws of Georgia railroad companies are required to separate the white and negro passengers as much as practicable; and the defendant company has a regulation, which is conspicuously posted in many of its cars, requiring white passengers to seat from the front, and negro passengers from the rear, of cars. On the occasion in question there were a number of passengers in the car; the white passengers being seated toward the front and the negroes toward the rear. "Petitioner further shows that in Georgia the negro race is recognized and considered inferior to the white race, and that the law of the state of Georgia recognizes this distinction in various ways, notably by its provisions to separate the races in railroad cars, by laws against the intermarriage of members of the two races, and by laws preventing the mingling of the said two races in the common schools of said state." After plaintiff and his sister had seated themselves, and while they were engaged in conversation, the conductor came to them and took up their transfers. As he did so, he said to plaintiff: "You cannot sit there." "Petitioner thereupon arose, thinking there must be something the matter with the seat, and asked the conductor, 'Where do you wish me to sit?' The conductor thereupon replied, 'You must sit in the rear portion of the car.' Petitioner then said, 'Where?' to which the conductor replied: 'Beyond that white gentleman.' Petitioner thereupon responded, 'Why do you wish me to sit there?' to which the conductor replied: 'That is all right. Sit down here'—indicating space between the last white man and a negro, whereupon petitioner and his sister both asked, 'What is this for?' to which the conductor replied, 'Because white people seat from the front and negroes from the rear of the car.' Petitioner thereupon asked, 'What has that to do with me?' and the conductor responded, 'Haven't I seen you in colored company?' Petitioner's sister then addressed the conductor as follows: 'Do we look like colored people?' and petitioner, for the first time understanding the import of the conductor's language, demanded an explanation and apology, whereupon the conductor stated that he might be mistaken, but that he thought he had seen petitioner with some colored people." This colloquy took place in the presence of all the passengers, some of whom knew plaintiff, and was in a tone loud enough to be heard all over the car, and plaintiff was extremely mortified and humiliated by the occurrence. The "conductor by his statements intended to charge, and did charge, petitioner and his sister with being negroes, * * * and the effect of said colloquy was to create on the minds of strangers that petitioner had colored blood in his veins, and that he was attempting to pass as a white person; that the effect

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of said colloquy on persons who knew petitioner was that as a white person he had been associating with negroes." Plaintiff's feelings were outraged by the conductor's conduct, not only on his own account, by reason of the humiliation and mortification which resulted to his sister under the circumstances. "Petitioner shows that [neither] he nor his sister had ever been seen with, nor had they associated with, negroes, and there was absolutely no excuse for such a statement on the part of said conductor, and that said conduct was the result of the greatest negligence on his part." The petition closes with a prayer for judgment for damages in the sum of \$2,000 and for process.

Dorsey, Brewster & Howell, for plaintiff in error.

Rosser & Brandon, Walter S. Colquitt, and Ben J. Conyers, for defendant in error.

FISH, C. J. (after stating the case). Plaintiff based his claim to recover upon an alleged violation of the well-established rule that it is the duty of a railroad company to protect a passenger from injury, violence, insult, and ill treatment at the hands of the servants of the carrier, who are in charge of or connected in any way with the carriage in which the passenger is being transported. *Savannah, F. & W. Ry. Co. v. Quo*, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85; *Georgia R. & Elec. Co. v. Baker*, 120 Ga. 991, 48 S. E. 355, and citations; *Hutch, Carriers*, §§ 595, 596; *Thomp. Negl.* § 3186; *Booth on Street Railways*, § 682. The question sought to be made by the petition is whether it is an insult, for which an action lies against a street railway company, without an allegation of special damages, for a conductor on one of its cars while endeavoring to comply with the statute requiring him, as far as practicable, to separate white passengers from colored passengers, to negligently mistake a white passenger for a colored one, and, in the presence and hearing of other passengers, to inform him that he must be seated in that portion of the car set apart for negro passengers. As to whether it is actionable per se to call a white man a negro, or to publish him as such, see *Eden v. Legare*, 1 Bay (S. C.) 171; *Wood v. King*, 1 Nott & McC. (S. C.) 184; *Barrett v. Jarvis*, *Tappan* (Ohio) 244; *Johnson v. Brown*, 4 Cranch, C. C. 235, Fed. Cas. No. 7,375; *Scott v. Peeples*, 2 Smedes & M. (Miss.) 546; *McDowell v. Bowles*, 53 N. C. 184; *Sportono v. Fourishon*, 40 La. Ann. 423, 4 South. 71; *Upton v. Times-Democrat Pub. Co.*, 104 La. Ann. 141, 28 South. 970. However interesting the question sought to be made in the present case may be, and whatever opinion we may entertain in regard to it, we are not authorized, under the view entertained by a majority of the court, to decide it, for the reason that the petition fails to allege that the plaintiff is a white man. Such an allegation was, of course, essential to maintain the contention that he was insulted by the language used by the conductor. It is true that the petition alleged "that the effect of said colloquy was to create on the

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minds of strangers that petitioner had colored blood in his veins, and that he was attempting to pass as a white passenger; that the effect of said colloquy on persons who knew petitioner was that as a white person he had been associating with negroes." Merely alleging the effect the colloquy created on the minds of others is very far from alleging plaintiff to be a white man, as such effect might have been produced, though the plaintiff may not be a white man.

The allegations as to the effect of the colloquy upon strangers does not show, or clearly indicate, that the plaintiff is a white man; that is, a member of the Caucasian race. The plaintiff might be a mulatto and still the effect of the conversation upon the minds of persons to whom he was a stranger might be that he had colored blood in his veins, and that he was attempting to pass as a white person. The allegation "that the effect of said colloquy on persons who knew petitioner was that as a white person he had been associating with negroes" simply amounts to an allegation that the effect of the colloquy upon such persons was that the plaintiff had been associating with negroes as a white person. A given conversation might produce the effect upon the minds of persons who knew a mulatto, or a Chinaman, that he, as a white person, had been associating with negroes; that is, that he had been associating with negroes, as a white person, or, in other words, posing and passing among negroes as a member of the Caucasian race. The general demurrer assailed every substantial imperfection in the petition, and, as the petition was defective in a substantial particular, the demurrer was properly sustained.

Judgment affirmed. All the Justices concur, except BECK, J., not presiding, and COBB, P. J., and EVANS, J., dissenting.

SEABOARD AIR LINE RY. CO. v. BRADLEY.

(Supreme Court of Georgia, March 28, 1906.)

[54 S. E. Rep. 69.]

Carriers—Injury to Licensee—Alighting from Train.—The petition stated a cause of action, and the demurrer was properly overruled.

Same—Duty of Railroad Company.*—When one assists a passenger aboard a train at a station, intending not to become a passenger himself, but to leave the train after helping the passenger on the cars, no duty arises to hold the train for a reasonable time in order that such purpose may be accomplished, unless knowledge of such purpose is communicated to the company's servants. An instruction to the effect that a railroad company is bound to use ordinary diligence

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to persons assisting or accompanying their passengers, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Cleere* (Ark.), 17 R. R. R. 61, 40 Am. & Eng. R. Cas., N. S., 61.

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to ascertain the purpose of a person boarding its cars is erroneous, as placing a burden on the company which the law does not impose.

Same—Duty of Conductor.—It is for the jury to say whether performance or non-performance of a specific act is compliance with the duty which the law imposes upon the carrier under the particular circumstances of each case.

Evidence—Expert Testimony.—An expert may be asked his opinion of a hypothetical case even though the facts thereof be the same as those of the case on trial.

New Trial—Grounds of Motion.—A ground of a motion for a new trial that the verdict is contrary to a specified charge is equivalent to a complaint that the verdict is contrary to law.

Carriers—Negligence—Accident—Instructions.—The charge on the subject of accident was not prejudicial to the defendant.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by J. L. Bradley against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant brings error. Reversed.

E. A. Hawkins, for plaintiff in error.

J. A. Hixon and Shipp & Sheppard, for defendant in error.

EVANS, J. The petition made the following cause of action: Plaintiff's sister, intending to become a passenger on defendant's train, boarded the train at one of its regular stations. She was accompanied by some small children, and her baggage consisted of two satchels. It was necessary for some one to take the satchels on the train, as the train only stopped long enough for passengers to get on and off the cars at the station, with a reasonable time to put the baggage on the train. Petitioner assisted his sister on the car and placed the satchels in the coach in as hurried a manner and as expeditiously as possible. The conductor knowing of petitioner's presence on the train and for what purpose he was there, recklessly and carelessly waved the train to start, and caused the train to start after stopping about one-half of the usual time it stopped at the station, and before his sister could get a seat and before plaintiff could get off the car. When plaintiff "started to step off the platform or steps to the coach, the train gave a violent and unusual jerk, which caused petitioner to fall to the ground, throwing petitioner on his left side, bruising" and injuring him. The injuries thus inflicted were set out, and alleged to be of a permanent nature. Petitioner claimed damages both special and general. The defendant demurred to the petition on the ground that no sufficient cause of action was plainly and distinctly set forth in orderly paragraphs entitling plaintiff to recover, and because the petition disclosed that plaintiff was guilty of negligence and by the use of ordinary care on his part he could have avoided the consequences of defendant's negligence, if defendant was guilty of negligence. The demurrer was overruled, and exceptions pendente lite were taken to the overruling of the demurrer.

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1. A railroad company owes to one who boards its train, for the purpose of assisting a prospective passenger and then disembarking from the train, with knowledge of the conductor of his presence and purpose, the duty to observe ordinary care for his safety. This duty would have required the company to delay its train a reasonable time for him to get off. If the conductor signaled the train to start before the escort of the passenger had a reasonable time to alight, and, because of a violent and unusual jerk in starting the train, the passenger's escort was thrown from the cars while in the act of alighting and was injured, the company would be liable. *Suber v. Ry. Co.*, 96 Ga. 42, 23 S. E. 387. Applying the principle of this case to the petition, a cause of action was set forth; and, as the plaintiff's case was stated in orderly paragraphs consecutively numbered, there was no error in overruling the demurrer.

2. The case proceeded to trial and resulted in a verdict for the plaintiff. A motion for a new trial was made by the defendant, which was overruled, and the company excepted. On the trial, the plaintiff testified that on the day he received his injury his sister, with four small children, went to the station at Leslie for the purpose of taking the train to Cordele. As to what occurred after the arrival of the train at the station, he said: "I took the satchels and went up in the car, and the conductor came down on the left side and helped my sister and those three children. One of them had never walked. And as the train stopped, I went up on the right-hand side with these satchels, and got 8 or ten feet in the train, and put the satchels down and came back out, and as I came back out on the steps the train jerked and pulled out, and I hit the ground about 15 feet further east than I was figuring on, and it threw me on the left side and sprained that wrist, which I discovered afterwards. * * * I saw the conductor when I got on. I was in 4 or 5 feet of him. There was nothing at all to keep him from seeing me. I don't know about how many minutes that train usually stopped at Leslie; long enough for all to get on and off and change the mails, usually 3 or 4 minutes. I would say he did not stop the usual length of time on this occasion. * * * As soon as the train stopped, I got on the steps of the forward coach and went right across the platform there to the ladies' coach and went in. * * * The conductor assisted my sister and the children aboard. I went on in the coach ahead of my sister, and went two or three seats down in the coach, and placed the baggage and came out on the platform. My sister hadn't got into the coach. I crossed over to the next coach, the same coach I got up on, while she was coming up on the steps of the first-class coach, and I passed off the platform ahead of her, and she passed in and got out of my sight. I didn't see her any more. I did not tell the conductor what my business was there. I did not say anything to him at all. I can't say positively whether he saw me." The conductor and other employees of this particular train, and the station agent, denied any

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knowledge of the plaintiff being hurt on this occasion. By reference to their memoranda of the business transacted while the train was at the station, they testified that the train stopped the usual time. The conductor denied any knowledge of the plaintiff's presence on the train.

As bearing on the duty of the company to the plaintiff under these circumstances, the court charged: "I charge you that under the laws in Georgia it is the duty of the common carrier—that is, a railroad company—to stop at its regular station a sufficient length of time for passengers to get on and off the cars with reasonable safety, which duty the defendant owed to the plaintiff if its agents or employees knew, or by the use of ordinary diligence could have known, that the plaintiff boarded the train to assist his sister on the train, who was to become a passenger." When one assists a passenger aboard a train at a station, intending not to become a passenger himself, but to leave the train after helping the passenger on the cars, no duty arises to hold the train for a reasonable time in order that such purpose may be accomplished, unless knowledge of such purpose is communicated to the company's servants. *Coleman v. Railroad Co.*, 84 Ga. 1, 10 S. E. 498; *Hill v. L. & N. R. Co.*, 124 Ga. 243, 52 S. E. 651, and citations. "In such cases the duty is dependent upon the knowledge of the carrier, and the negligence upon the nonperformance of the ascertained duty." *Yarnell v. R. Co.* (Mo. Sup.) 21 S. W. 3, 18 L. R. A. 599. This instruction placed a duty on the company which the law does not impose, viz., to use ordinary diligence to ascertain the purpose of a person boarding its cars. When a person enters a passenger train, the company's servants may assume that he contemplates becoming a passenger. If his mission is simply to assist a passenger on board the cars, he should inform the company's servants of his purpose, unless the attending facts are sufficient to impute such knowledge to them. There is no pretense that the conductor was informed of the plaintiff's purpose in boarding the train, even if the conductor knew of his presence on the train, nor will the attending circumstances justify the inference of knowledge of the plaintiff's purpose in boarding the train by any of the company's servants. Not only did this charge incorrectly state the law, but, under the evidence, it was harmful to the defendant. The jury were informed that the company was under a legal duty to use ordinary diligence in ascertaining the plaintiff's purpose in boarding the train, and the verdict may have been reached by a finding that while the company's servants may not have known of the plaintiff's purpose in getting on its cars, yet if ordinary diligence in endeavoring to learn his purpose had been observed, it would have been known to them.

3. The court declined to give in charge the following written request: "It is not the duty of a conductor of a passenger train to see that the platform of the coaches of the train is clear of persons, before moving the train from a station." This request

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was properly refused, because it is for the jury to say whether performance or nonperformance of a specific act is compliance with the duty which the law imposes upon the carrier, under the particular circumstances of each case.

4. The court excluded the following testimony of the conductor: "At a station like that, if there was but one passenger to board the train, ordinarily it would take only about half a minute for him to get into the coach from the ground." The court also refused to allow the conductor to answer the following questions, after being informed of the expected answers: "How long a time was ample for a man to have gone in a train as described, deposit baggage therein, come out again, and get off the train?" "How long would it take a passenger to get off a train at a station like Leslie?" The conductor was an expert witness upon the subject as to which he was interrogated, and his testimony should have been allowed. *Central Ry. Co. v. McClifford*, 120 Ga. 90, 47 S. E. 590. The court also refused to allow the engineer to answer the question: "How did you move off from Leslie that day, according to your recollection?" One of the allegations of negligence in the petition was that the plaintiff was thrown from the car by a violent and unusual jerk, and the plaintiff testified that he was thrown from the car because of the train moving off with a jerk. It was competent for the defendant to disprove this fact, and the court should have allowed the witness to answer the question.

5. Several grounds of the motion complain that the verdict was contrary to certain instruction of the court. In effect, these are complaints that the verdict is contrary to law. *Palmer Mfg. Co. v. Drewry*, 113 Ga. 366, 38 S. E. 837. As the case will be tried over, it is not necessary to discuss these grounds of the motion.

6. The court charged: "If you should believe, after going through the testimony and the law as I shall hereafter give you in charge, that Mr. Bradley was injured and that the injury was the result of an accident, pure and simple—that the railway company was not negligent through its agents and employees, but that it was an accident pure and simple—then the plaintiff would not be entitled to recover." The error complained of consisted in adding, in connection with the charge on the subject of accident, the words, "that the railway company was not negligent through its agents and employees." The idea of accident excludes responsibility because of negligence, and the court might have omitted the words complained of. But the charge as given could hardly have harmed the defendant. A new trial is ordered.

Judgment reversed. All the Justices concur.

SOUTH COVINGTON & C. ST. RY. CO. v. PHYSIOC.

(Court of Appeals of Kentucky, March 23, 1906.)

[92 S. W. Rep. 305.]

Carriers—Street Railways—Injuries to Passenger—Negligence—Contributory Negligence—Evidence.—Where plaintiff boarded a crowded street car, and stood on the steps of the platform thereof while the same was running rapidly and approaching a sharp curve, of whose existence plaintiff had knowledge, it was contributory negligence on his part to release, for the purpose of paying his fare, his hold on the handhold, precluding him from maintaining an action for injuries received through being thrown from the platform as the car rounded the curve.

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by William B. Physioc against the South Covington & Cincinnati Street Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

L. J. Crawford, for appellant.

Thos. L. Michie and Threlkeld & Threlkeld, for appellee.

BARKER, J. On the 24th day of March, 1903, the appellee, who lives in Newport, Ky., boarded a street car of the appellant company which was so crowded that he remained standing on the steps of the platform, and held on with his right hand to an upright iron bar fastened to the car, called in the record a "handhold," in order to avoid falling or being thrown off. While he was riding in this position, the conductor, who was inside the car when he boarded it, came to the rear door and called for his fare. Appellee had placed his fare in a pocket on the right side of his overcoat, and in order to get it out, released his grasp upon the "handhold," and, as he did so, the car, which was going at a rapid rate of speed, reached a curve, in rounding which appellant was thrown, or forced to jump, from the platform to the ground, by the lurching motion incident to the sudden change of direction, which so jarred him that he suffered a rupture, and was thereby permanently injured. Although the car stopped for him, he did not again get aboard, but waited and took another, and went to his place of business in Cincinnati. To recover damages for the injury received as above narrated, he instituted this action in the Campbell circuit court, alleging that the accident was due to the negligence of the appellant company in the operation of its car. The essentials of his cause of action are contained in the following excerpt from the petition: "Plaintiff says that he was injured as aforesaid by and through the wrongful and willful neglect and default of the defendant in this, to wit, that the defendant wrongfully, willfully, and negligently

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constructed and maintained its street railway track at and over the intersection of Third street and Washington avenue with a curve which was liable to cause its said street car to lurch in going over said curve, and also that the said defendant wrongfully, willfully, and negligently ran its said car over the said curve with great and unusual speed, whereby the said street car was caused to lurch in passing over said curve, and also that the said defendant wrongfully, willfully, and negligently caused, suffered, and permitted its said street car upon which plaintiff was a passenger as aforesaid to become and to remain crowded with passengers so that plaintiff was compelled to stand and remain upon the rear platform of the said car while passing around the said curve. Whereby, by and through the neglect and default of the defendant as hereinbefore stated, the plaintiff was thrown from the said car, and thereby injured as hereinbefore stated." The appellant company placed in issue all of the allegations of the petition, and pleaded contributory negligence on the part of the appellee, and the issues were completed by reply denying the affirmative allegations. A trial resulted in a verdict and judgment for the appellee (plaintiff) in the sum of \$5,000, from which this appeal is prosecuted.

On the trial of the case two grounds of negligence were relied on: First, that the appellant company permitted its rear platform to become so overcrowded that the appellee was compelled to remain standing thereon; and, second, that it was propelled around the curve at so rapid a rate that he was thrown from his position on the platform by the resulting lurch when the car suddenly changed its direction. When the appellee took passage on the car he knew of its crowded condition, and boarded it voluntarily in preference to waiting for one less crowded. In his evidence he made the following statement with reference to his position on the platform, and the manner and cause of his injury: "I hailed the car there this morning, and it was very crowded, and the nearest I could get on was to hang on with my toes on the platform; and I stood in that position and rode facing about southwest. I was standing about this position (illustrating), holding on an upright bar that goes up and down the body of the car; and when the car was going at a pretty rapid gait, faster than ever I seen it; and I just thought at the time that the conductor was behind, because he had not got his fares up then. I usually can get my fare in as soon as I get on the car at that point; and he touched me for my fare as the car was going down the grade there from Monmouth street to this curve, * * * and as we approached this curve going fast the conductor was inside the car and he came to the door, and he asked me for my fare. I released my hold and got the change out of my ticket pocket, overcoat pocket, and as I reached it to him and he got it, this car hit the curve and it twisted me, throwed me in that direction; and I had to run across pretty near the length of this room before I recovered my equilibrium to stand on my feet.

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Of course I felt angry about it. I might have sworn a little, but I would not get back on the car. I walked the other square to the bridge, and took another car." On cross-examination he said, in answer to the question, "And knowing that to be the case, standing by the edge of the platform, did you release your hold upon the upright bar?" "A. Well, I was not cognizant of the fact that we were on or near that curve. I was facing in the direction that I could not see back of me, and I didn't know that we were at that point. If I had seen that we were coming up to that danger there, I would have protected myself, I would not have paid my fare, I would not have let go, I would have taken care of myself, because I think that is every man's position, to take care of himself. Q. How could you have protected yourself? A. I could have held on tighter. I know very well it could not have swung me off if I had held to it, because I am strong enough to hold my weight up." Again: "Q. In what other way could you have protected yourself besides holding with your right hand? A. I don't know any other way only if I had retained hold of that bar till the car had passed that curve I know I could have held on, because I know you get a pretty hard jolt when going slow, and this car was going rapidly. I believe if I had held on to it, it might have swung me a little, but I do not think it would have thrown me at all if I had hold of the bar."

Two things are patent upon appellee's own statement: first, that he boarded the car voluntarily when it was so crowded that he was compelled to stand on the platform; second, that even there he was perfectly safe until he released his grasp on the "handhold." This he did voluntarily. The conductor did not force, or even ask him, to do so, or know that this was necessary in order for him to pay his fare. Appellee knew the car was running rapidly, and that there were curves in the track, for he, in another part of his testimony, states that he had traveled the line twice daily for three or four years. It is true, he did not have it in mind that he was so near the curve, but when he released his grasp, the retention of which made his otherwise perilous position on the platform secure, this was a voluntary act for which the company was in nowise responsible. The request of the conductor, that he pay his fare, was not of that urgency which required him to imperil life or limb in an effort to comply with it. He could have explained to the conductor his position, or he could have crowded in further, or requested the conductor to stop the car and let him get off, rather than place himself in the peril which was involved in his releasing his grasp of the "handhold" while the car was being rapidly propelled along the track. It was not the striking of the curve at too rapid a rate that threw him to the ground, but, according to his own statement, this was the result of his releasing his grasp on the "handhold" of the car.

There is nothing in this record that tends to show that any act or omission on the part of the company was the proximate

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cause of appellee's injury; but, on the contrary, his own statement shows beyond question that he was injured by his own reckless negligence in releasing his grasp of the "handhold" while standing on the edge of the platform of the car. It takes but little familiarity with street cars and natural laws to know that if a passenger stands on the edge of the platform, without holding on to something to prevent him from falling, when the car strikes a curve—whether it be going fast or slow—he is in great danger of being thrown off. Appellee knew this, and, so knowing, he had no right—at the expense of the company—to imperil his life or limb in the manner which his own statement shows he did. His negligence in this matter is too plain for dispute.

The trial court should have sustained appellant's motion for a peremptory instruction to the jury to find for it at the close of appellee's testimony; and for this reason the judgment is reversed for proceedings consistent herewith.

CROWE v. MICHIGAN CENT. R. CO.

(Supreme Court of Michigan, Jan. 24, 1906.)

[106 N. W. Rep. 395.]

Carriers—Passengers—Negligence—Equipment.*—The use by a railroad for a standard three-step passenger car of the height and construction commonly used by railroads is not negligence, although a four-step car, the lower step of which is eight inches nearer the ground than the lower step of the three-step car, is used on some roads.

Same—Equipment of Stations—Care Required.†—The high degree of care required of carriers in transporting passengers, and in constructing and caring for their cars for that purpose, is not required in the construction and maintenance of its platform and station grounds; but, as to them, reasonable care, to be determined by the surroundings and the probable dangers, is all that the law requires.

Same—Defects in Platform—Negligence.†—A hole six inches deep and containing a loose obstacle in the bottom thereof, situated in a station platform upon which passengers are invited to step when alighting from cars, is a negligent defect.

*See generally, extensive note, 13 R. R. R. 154, 36 Am. & Eng. R. Cas., N. S., 154.

†For the authorities in this series on the subject of the care required of a carrier of passengers in regard to the safety of stations, platforms, and other stopping places, see foot-notes appended to *Murnahan v. Cincinnati, etc., Ry. Co. (Ky.)*, 17 R. R. R. 667, 40 Am. & Eng. R. Cas., N. S., 667; foot-notes appended to *McCormick v. Detroit, etc., Ry. Co. (Mich.)*, 17 R. R. R. 516, 40 Am. & Eng. R. Cas., N. S., 516; foot-notes appended to *Abbott v. Oregon R. Co. (Ore.)*, 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *West v. St. Louis S. W. R. Co. (Mo.)*, 15 R. R. R. 855, 38 Am. & Eng. R. Cas., N. S., 855.

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Same—Contributory Negligence—Question for Jury.—In an action against a railroad for injuries sustained by a passenger while alighting from the train at a station, whether the passenger was guilty of a contributory negligence, held, under the evidence, a question for the jury.

Same—Actions—Weight of Evidence.—In an action against a railroad for injuries sustained by a passenger while alighting from the train onto a station platform, verdict for plaintiff held against the weight of the evidence, so that a new trial should have been granted.

Error to Circuit Court, Shiawassee County; Stearns F. Smith, Judge.

Action by Fred Crowe against the Michigan Central Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Plaintiff, a traveling salesman, alighted from the smoking car of the defendant at Owosso at 8 o'clock a. m. October 24, 1903. He had a dress suit case in one hand, an umbrella and package in the other, and was smoking a cigar. In stepping from the car onto the platform constructed of cinders, he turned his ankle, causing the injury, for which he recovered a verdict of \$6,370. The negligence charged in the declaration is "Providing a step about three feet from the ground, being at least one foot or more higher or further from the ground than the steps of ordinary cars used in ordinary railroading. * * * Failure to pull its train up to the ordinary platform provided for the alightment of passengers, stopping its train and ordering plaintiff and other passengers to alight at a considerable distance south of its platform; and at the place of alightment where this plaintiff was directed, requested and invited to alight was a quantity of loose cinders, upon which said plaintiff stepped in alighting from the train." The declaration further alleges that in consequence of these conditions the loose cinders gave way under his foot, made his footing uncertain and unsafe, and caused the injury. The train stopped at the usual place. So this allegation of negligence is eliminated. Two grounds of negligence remain—the height of the step and the condition of the cinder platform.

Plaintiff described the accident as follows: "I got up, took my grip, and started for the door, walked to the door, started to step down the steps, as I got down from the step to the other getting off in this manner, I discovered there was something I ought not to step on. My foot was beyond my control, and I went into it and turned my ankle over. At this time I had the grip in my right hand, the umbrella and parcel in my left hand, and I was smoking a cigar. The cinder platform, in the first place, is below the rails, not up to the rails, and then it was scooped out extending in this manner basin form, but larger than a basin, and where I stepped, stepped into the center of it and after I had—my foot had turned over. In getting up I looked up to see really what it was that was the cause, I discovered the height of the platform was much higher

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than the other platform. I discovered also a chunk of cinder my foot had struck, which was loose and rolled. That is all I discovered." He further testified that the chunk of cinders upon which he stepped was in a hole at least six inches lower than the surface, and a foot to two feet across the top; that the chunk of cinders was about six inches long by two or three inches wide, and rough. "When I stepped on it, it just turned my foot over, tore the ligaments open, and broke the bones." Plaintiff was familiar with the cinder platform. Owosso was his home. He had been in and about there for 20 years, and had been familiar with the station grounds for 12 or 14 years. He frequently for many years boarded, and alighted from, trains at this same place.

Argued before MCALVAY, GRANT, BLAIR, MONTGOMERY, and HOOKER, JJ.

George L. Nadolleck (O. E. Butterfield and John T. McCurdy, of counsel), for appellant.

Watson & Chapman, for appellee.

GRANT, J. (after stating the facts). It was conclusively established that this car was a standard one, of the height and construction such as is in common use upon railroads. It was the standard, three-step smoking car. There are also four-step smoking cars; but no such car had been in use upon this road, extending from Jackson to Saginaw, for three or four years. The difference in height between a three-step and a four-step car is about eight inches. The court should have instructed the jury that the use of this car was not negligence.

2. Counsel for defendant insist that the existence of the hole with the piece of cinder in the bottom, as described by plaintiff, was not negligence, citing *Jackson v. City of Lansing*, 121 Mich. 279, 80 N. W. 8. The high degree of care required of common carriers of passengers, in transporting them and in the construction and care of their vehicles for that purpose, is not required by the law in the construction and maintenance of its platforms and station grounds. Reasonable care to be determined by the surroundings, the situation, and the probable dangers, is the requirement of the law. 6 Cyc. 605; 3 Thomp. Law of Neg. § 2697; 5 Am. & Eng. Enc. Law (2d Ed.) 532; 26 Am. & Eng. Enc. Law (2d Ed.) 512; *Hiatt v. Des Moines, etc., R. Co.*, 96 Iowa, 169, 64 N. W. 766; *Finseth v. City, etc., Ry. Co.*, 32 Or. 1, 51 Pac. 84, 39 L. R. A. 517; *Pennsylvania Co., etc., v. Marion*, 104 Ind. 239, 3 N. E. 874; *Ill. Centl. R. R. Co. v. Hobbs*, 58 Ill. App. 130; *Mayor, etc., of New York v. Bailey*, 2 Denio, 433; *Collins v. Toledo, etc., R. Co.*, 80 Mich. 390, 45 N. W. 178; *McKone v. M. C. R. R. Co.*, 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596. Counsel for plaintiff concede this to be the rule. Reasonable care is a relative term, to be determined by the surroundings of each case, and the danger to be apprehended and

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avoided. *St. L. & I. M. Ry. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550. The construction of a platform may be such that a very high degree of care will be required in its construction and maintenance. Such was the case where the platform joined an open trestle. *Johns v. Charlotte, etc., R. Co.*, 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. Rep. 709. We do not think that *Jackson v. City of Lansing* is applicable. That was a depression worn in a sidewalk to the depth of about three inches. There are depressions and steps in sidewalks which the law recognizes as not negligent and the risk of which the traveler must assume and guard against. We are not prepared to say that a hole six inches deep and containing a loose obstacle in its bottom would not constitute negligence even in a sidewalk. We think it evidently would constitute negligence when existing in a platform upon which passengers are invited to step when alighting from cars. A passenger has a right to assume that such platform is reasonably safe. He must alight with reasonable expedition. Others may alight before him and partially obstruct his view. He may be holding his traveling bag or packages, which may also somewhat interfere with his vision.

3. It follows from what has already been said that the plaintiff was not as a matter of law guilty of contributory negligence in stepping as he did from the car. It was a question for the jury to determine from all the surrounding circumstances.

4. Defendant made a motion for a new trial, one of the grounds of which was that the verdict was against the overwhelming weight of the evidence. Whether the jury found the defendant guilty of negligence on account of the height of the steps of the car or the hole in the platform, with a chunk of cinder therein, it is impossible to determine. It is due to the intelligence of the jury to believe that they did not find that a hole such as that described by the plaintiff existed. The overwhelming weight of the evidence is against such claim. Plaintiff alone testified to its existence. It is significant that he did not allege in his declaration either the existence of the hole or of the chunk of cinder, but that he stepped upon loose cinders. He never saw the hole before, and he had taken the train and had alighted there many times a year. No such accident had ever occurred before upon this platform. It is not probable that the defendant would permit the existence of so dangerous a place for passengers to alight. Several employees of the defendant and other entirely disinterested witnesses testified that the platform was firm and level, and that there was no hole. Two disinterested persons standing close to the plaintiff as he alighted, and who witnessed the accident, testified that plaintiff stepped upon a loose piece of coal lying upon the platform; and one of them testified that he kicked it away with his foot, saying to the plaintiff: "That is what you stepped on." The evidence, aside from the plaintiff's testimony, established beyond a reasonable doubt that this platform was level, solid, and in good condition. The presence of a piece of

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coal, entirely unaccounted for, was undoubtedly the cause of the plaintiff's accident. Upon the question of granting new trials, see *Brassel v. Minneapolis, etc., R. Co.*, 101 Mich. 5, 59 N. W. 426; *Gregory v. Detroit, etc., R. R. Co. (Mich.)* 101 N. W. 546; *Whipple v. M. C. R. R. Co.*, 130 Mich. 460, 90 N. W. 287.

Other questions are raised, but as they are not likely to occur upon a new trial, should one be had, we deem it unnecessary to determine them.

Judgment reversed, and new trial ordered.

SOUTHERN RY. CO. v. CULLEN.

(Supreme Court of Illinois, April 17, 1906.)

[77 N. E. Rep. 470.]

Carriers—Who Are Passengers—Employees of Shipper.*—Where a carrier contracted to transport cars of cattle, and to carry an agent of the shipper upon the "freight train," and the cars, after being loaded by the shipper, were met by a switching crew with a locomotive, which was to take the cars to yards, where they were to be put into a train being made up, but there was no caboose attached to the cars during the run to the yards, a servant of the shipper, who had been instructed to accompany the cars, and who rode upon the locomotive, was a passenger.

Same—Action—Instructions.—Where, in an action against a carrier, the declaration was drawn on the theory that the relation of passenger and carrier existed, and stated a good cause of action, an instruction that if the jury believed the defendant guilty of the negligence charged in the declaration, and that the injury resulted therefrom, plaintiff was entitled to recover, was not erroneous, on the ground that it did not require the jury to find that plaintiff was a passenger.

Appeal from Appellate Court, Fourth District.

Action by Joseph Cullen against the Southern Railway Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court for the Fourth District, affirming a judgment of the city court of East St. Louis, in a personal injury suit, for the sum of \$1,000. The following statement of the facts is taken in large part from the opinion of the Appellate Court:

On March 7, 1903, appellant was operating a railroad from

*See foot-notes appended to *Chicago & A. R. Co. v. Walker (Ill.)*, 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to *Illinois Cent. R. Co. v. Proctor (Ky.)*, 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

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East St. Louis to and beyond Mt. Carmel, Ill., and also a belt line extending from the village of Brooklyn, just north of East St. Louis, to what was known as its "Dyke Yards," in the southern portion of the city, on the Mississippi river. The belt line connected with all the other railroads entering East St. Louis, and along it were located a number of industries having spur tracks connecting with it. One of them was and is the St. Louis National Stock Yards Company, which has stock yards located just north of the city, and owns and operates a railroad on its property which connects with the belt line of appellant about half a mile north of the stock yards. In delivering stock the stock yards company takes it to the junction with its own engines, where it is received by appellant. Appellant owns and operates certain railroad yards known as the "Denverside Yards," located from $2\frac{1}{2}$ to 3 miles distant from the stock yards, in the southern portion of the city of East St. Louis, where all east-bound trains over appellant's road are made up. Appellant's switching crews receive cars from the stock yards at the junction of the stock yards track and the belt railway, and deliver them over the belt line to the Denverside yards, to be made up into trains going east. On the day named, appellant entered into a contract with the Morris Beef Company to transport eight car loads of cattle from said stock yards to Newport News, Va.; one of the provisions of the contract being "that in consideration of the premises the railway company will transport for the party of the second part 152 cattle (more or less) from National Stock Yards, Illinois, to Newport News, Virginia, station, at the special rate of thirty cents per hundred pounds, and will afford a free passage to the party of the second part, or his agent, on the train, with the animals, if shipped in car load quantities." The contract then prescribed the duties of the shipper in reference to care of the stock while on the road, and states, "and to that end he or his agent in charge of said live stock shall ride upon the freight train in which said animals are transported." Appellee, who was then in the employ of the Morris Beef Company, engaged in taking charge of export cattle shipped by it to Newport News, Va., was instructed by his employer to accompany and care for the cattle named in said contract while in transit. The eight cars of cattle were loaded at the cattle chutes in the stock yards and taken from there by a stock yards engine over its tracks to the junction with the belt line, where they were met by a switching crew of appellant with an engine and tender sent to take them over the belt line to the Denverside yards, to be put into the train then being made up for the east. Appellee, who had come with the cattle from the place where they were loaded, was present when appellant's switching crew took charge of the eight cars. He testified on the trial that he asked the foreman of appellant's engine crew if he could ride on the engine; that the foreman asked him if he had a bill, and he replied that he thought the stock yards foreman had that with other bills for live stock;

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that the foreman of the engine crew then said he was in a hurry and for appellee to jump on the engine. This statement is denied by the foreman, but, however that may be, it is not questioned that appellee did at that time get upon the engine and it started for the Denverside yards with the eight cars. On the way to the yards the engineer discovered a freight car projecting from a spur track onto the belt line, and, finding he was unable to stop in time to avoid a collision, he and his fireman jumped from the engine. They were followed by appellee, who, in his fall, received injuries for which he afterwards brought this suit against appellant.

Appellant contends that the stock contract gave appellee no right to ride on the engine as a passenger from the stock yards to the Denverside yards, and that it did not appear from the evidence either that the engine foreman had express authority to carry him as a passenger, or that it had been the custom for switching crews of appellant to carry passengers between the points named, and that appellee was therefore riding upon the engine without authority and was not to be considered as a passenger. On the contrary, appellee asserts that the relation of passenger and carrier existed between the parties to the suit, and that this relation was not created by custom nor by invitation from defendant's employees, but by the express contract introduced in evidence by appellee and referred to in the declaration. Appellant insists that the kind of train to which the contract refers is a freight train, made up of an engine, freight car or cars, and a caboose, and that the contract contemplated only that appellee should ride upon such train so made up. The declaration contained two counts, each drawn on the theory that the relation of passenger and carrier existed between appellee and appellant. The negligence, according to the averments of the narr. consisted in leaving the car with which the engine collided too near the belt line, and in running the engine and cars at an unlawful and dangerous rate of speed. The plea interposed was the general issue. At the close of all the evidence appellant moved the court to direct a verdict in its favor. This motion was denied. Appellant urges that this motion should have been allowed, because it did not appear that appellee was rightfully upon the engine.

Kramer & Kramer (Alexander P. Humphrey, of counsel),
for appellant.

Freels & Joyce, for appellee.

Scorr, J. (after stating the facts). The eight freight cars and the switch engine, coupled together for the purpose of moving from one point to another upon the railroad track under power furnished by the engine, constituted a train. *Caron v. B. & A. R. R. Co.*, 164 Mass. 527, 42 N. E. 112. Appellee's contract not only permitted him to ride upon this particular train, but required him to do so, and, according to the undisputed evidence in this record, when he went upon the engine to ride he went there

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rightfully and there became a passenger for hire. The train was just starting upon its long journey to Newport News, Va. It was the duty of appellant to furnish at the National Stock Yards a suitable car in which appellee might ride. It failed in that duty, and, by its counsel, says that appellee should have refrained from getting on the train, and by riding on a street car, or by some other method of travel, have overtaken the train at the next station, which would have been the Denverside yards of appellant, where, it is said, a caboose would have been added to the train, in which appellee might have ridden safely. Appellee was under no obligation to do this. When appellant's engine was attached to these cars the train upon which he was entitled to ride was before him. His contract authorized and required him to ride upon that particular train. He needed no permission from those in charge of the train. The written contract made him a passenger for hire, and it is entirely immaterial whether the foreman of the train did, or did not, consent that he should ride. It is also immaterial whether appellant was engaged generally in the business of carrying passengers from the National Stock Yards to the Denverside yards, or whether the train foreman had the actual or apparent authority to permit or invite appellee to become a passenger upon the engine. Appellee found himself confronted by unusual and exceptional circumstances, under which he might lawfully ride upon the engine. *Lake Shore & Michigan Southern Railroad Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510. In *Illinois Central Railroad Co. v. Jennings*, 217 Ill. 140, to which appellant calls attention, the shipper's contract, unlike that of appellee, expressly provided that he should ride in the caboose, and there was a caboose attached to the train. He left the caboose and at the invitation of the conductor rode upon the engine. The case at bar is entirely dissimilar.

Appellant makes the same objection to the second and seventh instructions given on the part of appellee. The second was in words following: "If the jury believe, from a preponderance of the evidence, that the defendant is guilty of the negligence charged in the declaration, or either count thereof, and that the injury to plaintiff complained of and alleged in the declaration resulted directly therefrom, and that the plaintiff was in the exercise of ordinary care for his own safety before and at the time of the injury, the defendant is liable, and the plaintiff is entitled to a verdict." In cases of this character, where the declaration states a good cause of action, it would seem to be axiomatic that, if the evidence showed the defendant was guilty of the negligence charged in the declaration, that the injury resulted directly therefrom, and that the plaintiff was in the exercise of ordinary care before and at the time of the injury, and had not assumed the risk, there should, as a matter of course, be a verdict against the defendant. Appellant, however, argues that this instruction furnished a test of liability, and that it was erroneous because it did

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not require the jury to find, from the evidence, before returning a verdict against the appellant, that the appellee was a passenger and rightfully upon the engine while riding there. It appears from the declaration that the relation of passenger and carrier existed between the parties hereto at the time of the accident, and the negligence charged against the appellant is a failure to exercise the care required by the law for the safety of its passenger. Unless the appellee was a passenger and rightfully upon the engine appellant was not guilty of the negligence charged in the declaration. The two instructions objected to stated the law correctly.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

ROHRIG v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, April 7, 1906.)

[106 N. W. Rep. 935.]

Carriers—Control and Regulation—Tickets—Redemption—Penalties.—Where the telegraph operator at a railroad station, while relieving the station agent, refused to redeem a passenger ticket, the railroad was liable under Code Supp. 1902, §§ 2128a, 2128c, imposing a penalty for a failure to provide for the redemption of passenger tickets; the mere fact that the station agent had been authorized to redeem tickets being no defense.

Appeal from District Court, Fayette County; L. E. Fellows, Judge.

Action at law to recover the price paid for a railway ticket, and for a statutory penalty. The facts will be found stated in the opinion. There was a trial to the court resulting in judgment for plaintiff. Defendant appeals. Affirmed.

Carroll Wright, J. L. Parrish, and Clements & Clements, for appellant.

C. T. Jones and L. M. Whitney, for appellee.

BISHOP, J. Plaintiff purchased a ticket at the station ticket office of the defendant railway company at Oelwein, this state, good for passage to the station of Maynard. Owing to the train being late, he was compelled to give up the trip. Three days later he presented himself at the ticket office, and, in connection with the purchase of a ticket to another station, presented the Maynard ticket and asked that it be redeemed. The person in charge of the ticket office, being the same person from whom the ticket had been purchased, refused to redeem, saying that the request was one day late; that, "We don't redeem tickets after they are two days old, and you will have to send this to the gen-

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eral office." It is provided by statute that "it shall be the duty of every railroad company * * * to provide for the redemption, at the place of purchase and at the general passenger agent's office, * * * of any passenger ticket that such carrier may have sold, * * * and no carrier shall limit the time in which redemption shall be made to less than ten days from date of sale at the place of purchase," etc. Code Supp. 1902, § 2128a. And, further, that "any railroad company, * * * who as a common carrier shall sell or issue tickets * * * and shall refuse or neglect to redeem the same * * * within ten days of date of demand, shall forfeit and pay to the owner of such ticket the purchase price of said ticket, and the further sum of one hundred dollars." Code Supp. 1902, § 2128c.

Upon the trial it was made to appear that the station agent at Oelwein was one Hillman, and, as a witness for defendant, he testified that he was in charge of the company's office and business at that station, and that he was authorized by the company to redeem tickets that were unused. It was also made to appear that the person who sold the ticket to plaintiff, and who subsequently refused to redeem it, was one Luce, telegraph operator in the office. Hillman testified that Luce was accustomed to relieve him at the ticket window when he was busy with other work. Plaintiff was not personally acquainted with Luce, and knew no more respecting his position or duties than was incident to his being at the ticket window and engaged in selling tickets.

The sole contention for reversal of the judgment as made by appellant is that the requirement of the statute having been complied with by the appointment of Hillman as station agent, with authority to make redemption of tickets, there can be no recovery in the absence of a showing that demand was made upon such agent in person. The contention is without merit. The requirement of the statute is that provision shall be made for the redemption of tickets. That means that the person or persons in charge of the ticket window, and authorized to sell tickets, shall be prepared to make redemption when called upon to do so. The statute is not satisfied by the mere appointment of one person who may or may not have his station at the window where the ticket business is transacted as the one through whom redemption must be made. The passenger has the right to assume that the person in charge is there by authority, and that he is clothed with all necessary authority incident to the business he is transacting on behalf of the company. *Wood v. Railway*, 68 Iowa, 491, 27 N. W. 473, 56 Am. Rep. 861. It was not contemplated that the right to have redemption made should be clogged by any nice questions of authority as between principal and agent, or that the passenger should be put to the peril of correctly ascertaining what particular person had been selected by the company to discharge the duty of making redemption. It would be absurd to say that the yardmaster or the foreman of the roundhouse might be designated by the company, and that a demand upon such per-

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son would alone be availing. And yet, if the company was bound to do no more than make provision by appointing some one person, as argued by counsel for appellant, such a result might well follow.

To conclude, as we interpret the statute, the duty of making provision requires of the company that through its agents and employees in charge of its ticket office, whether the number of the persons be 1 or 20, it shall make redemption when called upon to do so. And it cannot be heard to deny liability because that a particular person in charge by its authority had not, in fact, been instructed as to his duties in the respect in question. If a passenger finds one in charge, and hence held out as acting with authority, he may rely upon authority being present. The principle involved in this conclusion finds further support in the following cases: *Baker v. Railway*, 91 Minn. 118, 97 N. W. 650; *Turner v. Railway*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883; *Railway v. Moorman* (Tex. Civ. App.) 46 S. W. 662.

The judgment was right, and it is affirmed.

PITTSBURG, C. & ST. L. RY. CO. v. HIGGS.

(Supreme Court of Indiana, Dec. 5, 1905.)

[76 N. E. Rep. 299.]

Carriers—Personal Injuries to Passengers—Pleading.*—A complaint for personal injuries, relying wholly on a breach of duty imposed by law on defendant as a carrier of plaintiff for hire, alleges a cause of action for tort, and not on contract, although it recites that plaintiff paid defendant a certain sum for his transportation as a passenger, and a failure to prove a contract liability does not defeat recovery.

Same.—In an action for personal injuries to plaintiff while traveling as a passenger on defendant's road, unless the facts alleged in plaintiff's complaint are of such a character as to show that he assumed the risk, or that the liability of defendant was limited by some special contract, defendant, if it relies upon such an agreement or contract, must specially plead it as a defense.

Same—Issues.—In an action against a carrier for personal injuries to plaintiff, the complaint alleged that defendant, in consideration of a certain sum, received plaintiff as a passenger over its road, and while so traveling the injury occurred. The evidence did not show that plaintiff paid directly to defendant the sum named, but it appeared that he purchased a through coupon ticket from another company, and that one of said coupons entitled him to be carried over defendant's road, which coupon was taken up by defendant, and that defendant was entitled to some part of the entire amount paid for the

*See foot-notes appended to *Eckert v. Pennsylvania R. Co.* (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475.

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ticket. Held, that it was not necessary for plaintiff to show that defendant's share was the amount alleged.

Same—Limitation of Liability.†—Where a railroad company is under the duty to carry a passenger, and it undertakes for hire to perform that duty, it cannot by contract legally exempt itself from liability arising out of the negligence of itself or servants.

Appeal—Harmless Error—Error in Instructions Cured by Verdict.—Where there was an entire absence of evidence to establish the issue of contributory negligence, and it follows that the verdict against defendant is clearly right on that feature of the case, the rulings of the court in giving or refusing instructions relative to contributory negligence, even if erroneous, are harmless.

Trial—Instructions Considered as a Whole.—A court in charging a jury is not required to cover all the questions or phrases of a cause in any one instruction, where the jury has been advised in regard to such points or questions in other parts of the charge.

Carriers—Actions for Injuries to Passengers—Evidence.‡—In an action against a carrier for injuries to a passenger, the prima facie case of negligence made out by evidence of a collision between the train upon which plaintiff was riding and another train owned and operated by defendant may be overcome by evidence of defendant that the accident could not have been avoided by the exercise of the highest practical care and diligence on its part, and it was error to instruct that such prima facie case must be overcome by clear and explicit proof.

Appeal—Harmless Error.—Though an instruction was not strictly accurate, the error is harmless, if it clearly appears from the evidence that a verdict for defendant would not have been justified.

†For the authorities in this series on the question whether a carrier of passengers can limit its liability, see foot-notes appended to *Sprigg's Adm'r v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-note appended to *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603.

‡For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a passenger is injured, see *Lincoln Traction Co. v. Heller* (Neb.), 17 R. R. R. 368, 40 Am. & Eng. R. Cas., N. S., 368 (carrier must show that it has discharged the full measure of its legal duty, and was in no wise to blame for the accident, unless defendant's negligence contributed thereto); *Patterson v. San Francisco & S. M. Electric Ry. Co.* (Cal.), 17 R. R. R. 552, 40 Am. & Eng. R. Cas., N. S., 552 (defendant entitled to verdict if it produces sufficient evidence to balance presumption without overcoming it by preponderance of evidence); *Cheetham v. Union R. Co.* (R. I.), 13 R. R. R. 292, 36 Am. & Eng. R. Cas., N. S., 292 (sufficiency of evidence where passenger injured by reason of a derailment); *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737 (rebuttal of presumption of negligence from parting of train was a question for jury); *Sambuck v. Southern Pac. Co.* (Cal.), 6 R. R. R. 687, 29 Am. & Eng. R. Cas., N. S., 687 (presumption of negligence arising from injury to passenger in a collision can be rebutted only by showing that the collision was the result of inevitable accident, or of some cause which human care and foresight could not prevent); *O'Connor v. Scranton Traction Co.* (Pa.), 6 Am. & Eng. R. Cas., N. S., 650.

Pittsburg, etc., Ry. Co. v. Higgs

Appeal from Circuit Court, Cass County; George A. Gamble, Special Judge.

Action by George W. Higgs against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under section 1337u, Burns' Ann. St. 1901. Affirmed.

G. E. Ross, for appellant.

Nelson, Myers & Yarlott, for appellee.

JORDAN, J. On July 13, 1903, appellee filed a complaint in the Cass circuit court, whereby he charged that appellant railroad company was, at the time therein mentioned, a corporation owning and operating a railroad known as the "Panhandle," extending from the city of Chicago, Ill., through the state of Indiana, to the city of Cincinnati, Ohio, and that said railroad company was a common carrier of passengers for hire. The complaint further averred that on April 22, 1903, said defendant railroad company, in consideration of the sum of \$10, received the plaintiff, appellee herein, as a passenger over its said railroad from Chicago, Ill., to Cincinnati Ohio, and while on its cars, on his journey, at or near the village of Kouts, in the state of Indiana, by and through the negligence of the said defendant and its servants in running and managing its railroad and trains of cars thereon, the train on which plaintiff was riding collided with another train, which was being run and operated by the defendant. Plaintiff was then and there and thereby, and because of such collision, suddenly and forcibly thrown out of his seat, whereby one of his ribs was broken, his head was bruised, spinal column strained and injured, all because of said collision. That he was rendered senseless for some time, and his injuries were of such a nature and character that it became necessary for him to have the immediate attention of a physician, and that ever since he has suffered great pain and mental anguish. Other facts are alleged, disclosing his age, occupation, good health, and condition at the time of the accident, and his inability thereafter to perform any work, etc. The complaint closes with the demand for \$15,000 damages. A demurrer thereto for want of facts was overruled, and thereupon appellant filed an answer in three paragraphs: First. A general denial. Second. Alleviating that on April 20, 1903, the plaintiff in the Northern Pacific Railway Company entered into a special contract at Spokane, state of Washington, by which the plaintiff was entitled to ride as a second-class passenger over the lines of said Northern Pacific Railway Company from said city of Spokane to Chicago, Ill., and from Chicago, Ill., to Cincinnati, Ohio, over the lines of the defendant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Other lines of railway over which plaintiff was entitled to ride on said ticket to Nicholasville, Ky., are stated. It is then averred that "the plaintiff agreed and undertook to assume all risks of accident and

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damage to his person or property while so traveling or being carried over said lines of railway; that said agreement was in the form of a ticket, and delivered to plaintiff by the said Northern Pacific Railway Company, and was the only evidence of his right to ride, or be carried over said lines; that, in pursuance of the said agreement as expressed in the ticket, the plaintiff started from said Spokane, and was so traveling on said ticket, and not otherwise, at the time he is alleged to have been injured, as charged in the complaint," etc.—wherefore defendant says the plaintiff ought to recover in this action. The third paragraph is substantially the same as the second, and thereon and thereby appellant alleged and set up as a defense to the action that "by the terms of said contract the plaintiff agreed and undertook to assume all risks of accident and damage to his person or property while so traveling or being carried over said several lines of railroad." No copy of the contract or agreement referred to is filed with or made a part of either of the paragraphs of answer.

A demurrer by appellee for want of facts was sustained to the second and third paragraphs. The cause, being at issue upon the complaint and answer of general denial, was tried by a jury, and a general verdict, finding in favor of appellee, and awarding him damages in the sum of \$300, was returned by the jury. Along with this general verdict, the jury returned answers to a number of interrogatories. By their answers to the latter the jury found, among other things, substantially as follows: That the plaintiff got upon one of the defendant's passenger trains at the city of Chicago, Ill., about midnight on April 22, 1903, his final destination being Nicholasville, Ky. Before he boarded said train, he had purchased a ticket which entitled him to ride over the defendant's railroad. This ticket was purchased by the plaintiff at Spokane, in the state of Washington, of the Northern Pacific Railway Company, and was a special limited second-class contract ticket. Interrogatory No. 11, with the answer of the jury thereto, is as follows: "Interrogatory No. 11. Was the plaintiff, George W. Higgs, received by the defendant at Chicago, and being carried over its railroad from Chicago, Illinois, to Cincinnati, Ohio, April 23, 1903, under a special contract in writing, signed by him and entered into with the Northern Pacific Railway Company at Spokane, Washington? Answer. Yes. Meredith Tyner, Foreman." Over appellant's motion for a new trial and for judgment on the special findings of the jury, the court rendered judgment on the general verdict.

Appellant appeals, and assigns and argues for reversal certain alleged errors of the trial court.

The following facts appear to be clearly established by the evidence: Appellant is a corporation, owning and operating a railroad extending from Chicago, Ill., through the state of Indiana, to Cincinnati, Ohio, and is a common carrier of freight and passengers for hire. On April 20, 1903, appellee purchased of the agent of the Northern Pacific Railway Company at the city of

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Spokane, state of Washington, a coupon second-class ticket, which entitled him to be carried as a passenger from said city of Spokane to Nicholasville, Ky.; the latter being the home town of appellee. One of the coupons of this through ticket entitled him to be carried as a passenger over appellant's railroad from Chicago, Ill., to Cincinnati, Ohio. The price which he paid for this through ticket was \$53. The evidence does not expressly disclose the precise amount of money which appellant was entitled to receive from the railroad company selling the ticket for the distance which it carried appellee over its line of railway, but it is shown that it would be entitled to receive a proportionate part of the price for the ticket; the exact amount being a matter of calculation on the arrangement which it had with the railroad company which sold the ticket. Appellee appears to have started on his journey from Spokane on Sunday night, and arrived at Chicago the following Wednesday, being April 22, 1903. On the latter day, about midnight, he boarded one of appellant's passenger trains at the said city of Chicago, intending to become a passenger thereon from said city to the city of Cincinnati, Ohio. He went into the ladies' car, and took a seat about the center of that coach. He appears to have utilized two seats, one of which was turned over; that, as he was tired and sleepy from the effects of his long journey, he used these two seats for the purpose of lying down thereon, and soon after reclining upon his seat he fell asleep. After the train had left Chicago, the conductor in charge thereof came through the passenger car where plaintiff was, examined his ticket, and thereupon punched the coupon which entitled him to be carried from Chicago to Cincinnati. After sleeping for some time, appellee was awakened by a severe and sudden jolt, which gave forth a "dead sound." All he appears to have remembered on being awakened was that there was much confusion in the car, some of the ladies were screaming, and he, in the excitement and the confusion at the time, made a dash for the door of the car, and was there informed by some one that the train on which he was riding and a freight train on appellant's road had collided with each other at a point near Kouts, Ind. He returned to his seat, laid down thereon, felt sick, became very pale, great beads of sweat stood upon his face, and he complained of being injured, and evidence of the fact that he was severely injured and was suffering appears to have been evident to some of his fellow passengers. The conductor, on learning of appellee's injury, telegraphed to Logansport to the company's physician to attend upon appellee and give him medical attention when the train arrived at the city. This appears to have been done. The physician gave appellee some medicine and put plasters on his back to alleviate his suffering. Medicine also appears to have been administered to him between Logansport and Cincinnati. At the latter city, being unable to help himself, he was assisted from the train, and conveyed to a station, where he was placed on a train to carry him to Nicholasville, Ky. After reaching home,

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physicians were called to examine him, and they discovered that one of his ribs was broken or fractured, and that he was injured in other parts of his body. He continued to be disabled for quite a length of time, and was under medical treatment.

That the injuries which appellee received were the result of the collision in question, and that said accident was the approximate cause thereof, is fully sustained by the evidence. It is shown that the train upon which appellee was being carried collided with a freight train which appellant owned and was operating upon its railroad, and which at the time was in charge of its agents and servants. This fact is undisputed. The conductor in charge of the passenger train upon which appellee was being carried at the time was introduced at the trial as a witness in behalf of appellant, and his testimony goes to prove that the cause of the wreck or collision was the failure of the engine attached to the freight train to properly steam, and the breaking of a coupling. The collision was with such great force as to demolish the pilot of the engine of the passenger train upon which appellee was being carried, and to completely wreck the caboose attached to the freight train. That the collision in question was due to the negligence of appellant is, under the evidence, beyond controversy. There is also an entire absence of any evidence to show that appellee was in any manner guilty of contributory negligence; hence this element of the case may be dismissed without any further serious consideration.

Appellant's counsel argue that the complaint in this action is based upon an implied contract, while, as he asserts, the jury, by their answers to interrogatories, have found that appellee was being carried at the time of the accident under a contract which was evidenced by a special limited contract ticket. An examination of the complaint, however, fully reveals that it is not predicated on a contract, either express or implied, but the pleader relies wholly on breach of duty imposed by law on appellant company as a carrier of passengers of hire. That the action presented by the complaint sounds wholly in tort is manifest. What is averred therein as to the consideration which appellee paid for his transportation as a passenger over appellant's road is but a mere inducement to the action to disclose or show his right to sue as a passenger. 15 Ency. of Pl. & Pr. p. 1124; 4 Elliott on Railroads, § 1693. As a general rule, in determining whether an action like this is predicated on contract or tort, the court will look to the nature of the action alleged in the complaint, and, if no special contract is therein set out, it will construe the pleading as based on the tort of which the plaintiff complains. 4 Elliott on Railroads, § 1694. Unless the facts alleged in plaintiff's complaint are of such a character as to show that he assumed the risk, so as to be legally binding on him, or that the liability of appellant carrier is limited by some special contract, the latter, if it relied upon such an agreement or contract, must specially plead it as a defense to the action. *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55; 4 Elliott on Railroads, § 1696.

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Appellant's learned counsel in his argument apparently travels on the assumption that the complaint in this action is founded on the implied contract, and from this standpoint of assumption he proceeds to argue that, inasmuch as the jury found by interrogatories that appellee was being carried over appellant's road under a special limited second-class contract ticket, which he had purchased at Spokane of the Northern Pacific Railroad Company, therefore he cannot recover in this action, and that appellant's motion for judgment on the interrogatories of the jury should have been sustained. In support of this argument we are cited to a class of cases like *Lake Shore, etc., R. Co. v. Bennett*, 29 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459, and *Indianapolis, etc., Ry. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138, which were actions arising out of the loss or destruction of goods and chattels which had been delivered by the shipper to the carrier for transportation under such bills of lading. In these cases the plaintiff appears to have ignored the bills of lading containing a special contract under which the goods were shipped, and sued on the implied contract of a common carrier. The court in these cases held that, inasmuch as the evidence disclosed that the goods in suit were shipped under the terms or provisions of a special contract, consequently there could be no recovery by the plaintiff upon an implied contract, but that the causes should have been based on the bill of lading, and for that reason it was held that there was a fatal variance between the complaint and the proof. These decisions, however, have no application to the case at bar. As previously stated, the cause of action is not based on a contract, express or implied, but sound wholly in tort, and the liability incurred by the appellant under the facts alleged in the complaint and proven on the trial is not such from which it may legally exempt or relieve itself by contract. In *Indianapolis, etc., Ry. Co. v. Forsythe*, supra, which was an action for the recovery of goods destroyed by fire while in transit, Judge Reinhard, speaking for the Appellate Court, said: "If, then, the liability is one from which the carrier might relieve himself by contract, and such a contract was in fact entered into, there can be no doubt, under the Indiana authorities, that the action must be upon the contract, and not upon the common-law liability. The contract is, of course, not conclusive as to the right of recovery. After it is introduced in evidence, it then remains to be seen from the facts showing the loss whether such loss was or was not occasioned by some cause within the exception; but the burden of showing negligence in such case is upon the plaintiff"—citing authorities. It is true the evidence shows, and the jury specially found by their answers to interrogatories, that the ticket which appellee purchased at Spokane was a second-class limited ticket, which entitled him to be carried from the latter place to Nicholasville, Ky. The respective coupons of this ticket were all taken up by the railroad companies operating the lines over which appellee traveled, and at the time this action was instituted the ticket was

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not in his possession. Neither it, nor any part thereof, was introduced in evidence on the trial, and as to what were the special stipulations, limitations, or conditions therein contained, if any, is not disclosed by the evidence. In fact, there is nothing shown by the evidence which would authorize the assertion that appellee was required to predicate his cause of action upon the ticket in question, instead of basing it on the breach of duty imposed by law on appellant. Both the facts alleged in the complaint and those established by the evidence disclosed that at the time of the collision in question the relation of carrier and passenger for hire existed between him and appellant company. The purchase of the ticket in controversy and appellant's accepting appellee thereon as a passenger on its train certainly invested him with all of the rights of a passenger for hire. The negligence of the railroad company, as shown, from which the injury resulted, was a breach of duty which it owed to him under the law as a passenger. Ordinarily, a railroad ticket for passage is but a mere token, receipt, or voucher, as evidence that the passenger has paid the required fare. Where, however, in addition to its usual form, the ticket contains some reasonable stipulation or limitation or condition which has been assented to by the purchaser, then to this extent it may be said to constitute a contract. *Indianapolis St. R. v. Wilson*, 161 Ind. 153, 168, 66 N. E. 950, 67 N. E. 993, 100 Am. St. Rep. 261, and authorities there cited. Where the ticket contains provisions which can avail the carrier as a legitimate defense in an action by a passenger, founded on a breach of duty on the part of the carrier, it is its privilege or right to set up or interpose such defense to the action. We may assume that, had the ticket herein in controversy contained any provision or stipulation which inured to the benefit of appellant company, the latter would have taken the necessary steps to have properly availed itself of the benefit thereof.

While it is true, as previously stated, the evidence does not show that appellee paid directly to appellant \$10 as a consideration for his carriage over its road, still it does appear that he purchased a through coupon ticket, and that one of said coupons (the one which was taken up by appellant company) entitled him to be carried over its railroad as a passenger for hire from Chicago, Ill., to Cincinnati, Ohio. The exact part of the purchase price which appellant was entitled to receive from the selling company does not clearly appear. However, it is shown that it was entitled to receive its proportionate part of the purchase price of the tickets, and that whatever that amount might be was a mere matter of calculation under the arrangement which it had with the railroad company selling the ticket to appellee. Whether this amount was \$10, as alleged in the complaint, or less, is not material to appellee's recovery.

Appellant's contention that he must recover *secundum allegata et probata* is a well-recognized principle, which requires that the recovery, if at all, must be on the cause of action alleged in the

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complaint. But, under this rule, a plaintiff is only required to prove the substance of the material facts constituting his cause of action. *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74-93, 56 N. E. 434.

It is evident that the trial court committed no error in sustaining appellee's demurrer to the second and third paragraphs of answer, for the reason that each of these paragraphs set up as a defense the alleged fact that, under a contract or agreement entered into between appellee and the Northern Pacific Railroad Company, appellant was thereby exempted or relieved from liability of the negligence to which appellee in his complaint attributed his injuries. The doctrine is settled beyond dispute that where a railroad company is under a duty to carry a passenger, as in the case at bar, and it undertakes for hire or reward to perform that duty, it cannot by contract legally exempt or relieve itself of liability arising out of the negligence of itself or servants. *Ohio, etc., Ry. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Louisville, etc., Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *Indiana, etc., Ry. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; 4 *Elliott on Railroads*, § 1645.

Counsel for appellant refers to *Payne v. Terre Haute, etc., R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472, in support of his contention that, under the agreement or contract set up in the answer, appellee assumed the risk of appellant's alleged negligence. The latter case must not, however, be confused with cases like the one at bar. The plaintiff in the *Payne* Case was injured while being carried by defendant railroad company over its road on a free pass. The carriage of the plaintiff in that case was wholly gratuitous; hence the decision therein has no application whatever to the case under review.

Appellant complains of certain instructions given and refused. Some of these, however, were applicable to the question of contributory negligence; but, as heretofore said, there being an entire absence of any evidence to establish that issue against appellant, it must follow that, as the verdict of the jury is clearly right under the evidence upon that question or feature of the case, the rulings of the court in giving or refusing instructions relative to contributory negligence, even if erroneous, would be harmless.

By charge No. 3 the court, among other things, advised the jury to the effect that, if plaintiff proved a collision of the train upon which he was riding with another train owned and operated by the defendant upon its railroad, then the presumption arose that the injury was the result of some act or omission of the defendant, and that this presumption must be overcome by clear and explicit proof, and that the burden of overcoming the presumption was on the defendant. This instruction is criticised for several reasons. It is asserted by appellant's counsel that the court thereby informed the jury: First. That the occurrence of the

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accident was negligence per se, but the charge, however, is not open to this criticism. Second. That the court ignored therein the consideration of plaintiff's right on the train. Third. The question of contributory negligence. Fourth. That it invades the province of the jury by advising them that the presumption must be overcome by clear and explicit proof. Fifth. That it ignores the question of proximate cause. While the charge in question is not strictly accurate in some respects, especially in stating to the jury that the presumption or prima facie case made by plaintiff must be overcome by the defendant by clear and explicit proof, nevertheless, in regard to the other objections that it ignores certain points involved in the case, it may be said that a court in charging a jury is not required to cover all the questions or phases of a cause in any one instruction, where, as in this case, the jury has been advised in regard to such points or questions in other parts of the court's charge. *Atkinson v. Dailey*, 107 Ind. 117, 7 N. E. 902. It is true that, if it appears from the evidence that the train upon which appellee was being carried as a passenger over appellant's road collided with another train operated by it on its railroad, then, under the circumstances, a prima facie case of negligence, by the aid of a legal presumption, would be presented against appellant from the mere fact of the collision, and the burden would be upon it, in order to rebut or overcome this presumption or prima facie case of negligence, to prove that the accident in controversy could not have been avoided by the exercise of the highest practical care and diligence on its part. *Louisville, etc., R. Co. v. Faylor*, *supra*; *Terre Haute, etc., R. Co. v. Sheeks*, *supra*; *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201. But, nevertheless, the burden was upon appellee throughout the trial to maintain the affirmative of the issue of appellant's negligence. *Terre Haute, etc., R. Co. v. Sheeks*, *supra*. While it is true that this court in *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343, by McCabe, J., asserted that the presumption arising in favor of the plaintiff in a case like the one at bar "must be overcome by clear and explicit proof on the part of the carrier," still, all which can properly be said to be necessary is that the proof made by the carrier should be such as will operate to rebut the prima facie or presumptive case presented in favor of the plaintiff on account of the accident, by showing that it could not have been avoided by the exercise of the highest practical care and diligence on the part of the carrier. *Indianapolis St. R. Co. v. Schmidt*, *supra*. While it may be conceded that the instruction in controversy is not strictly accurate, nevertheless, as it clearly appears from the evidence that it did not in any manner operate to mislead the jury to the prejudice of appellant, the error in giving it was harmless. *Springer v. Bricker*, at this term.

Under the evidence, we fail to recognize how the jury would have been justified in returning a verdict adverse to appellee.

Prethrow v. West Jersey & S. R. Co

We have considered all of the questions presented by appellant, but discover no reversible error; in fact, we are fully satisfied that the merits of this case have been fairly tried and determined in the trial court.

The judgment is therefore affirmed.

PRETHROW v. WEST JERSEY & S. R. CO.

(Supreme Court of Pennsylvania, Feb. 26, 1906.)

[63 Atl. Rep. 415.]

Carriers—Injury to Passenger—Connecting Carriers.*—A railroad company sold a ticket for a journey to be made partly by railroad and partly by ferry. There was nothing on the ticket to show that any other carrier furnished any part of the transportation. Held, in an action by the passenger against the railroad company for an injury on the ferry, that he need not show that the railroad company operated the ferry.

Same—Question for Jury.—Where a passenger on a ferryboat was injured by a collision between the boat and a bulkhead, the question of the negligence of the railroad operating the ferry was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Margaret Prethrow against the West Jersey & Seashore Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented the following points: "(1) That the ticket purchased by plaintiff did not render defendant liable for the negligence of a connecting carrier, and as the evidence fails to prove that defendant operated the ferry upon which the accident happened, the verdict should be for the defendant. Answer: Refused. (2) That according to the evidence of the plaintiff, a tugboat passed rapidly in front of the bow of the ferryboat just as it was about to enter the slip, and in order to avert a collision, the latter was obliged to turn its bow slightly, thereby resulting in a jar with the piling; but as such facts, in the absence of any testimony as to the custom, laws or regulations of navigation in or upon the Delaware river fail to affirmatively establish negligence on the part of the ferryboat, the verdict should be for the defendant. Answer: Refused."

Verdict for plaintiff for \$12,000 upon which judgment was entered for \$8,000, all above that amount having been remitted.

*For the authorities in this series on the question embraced in the first head-note of the principal case, see foot-note appended to *Pennsylvania Co. v. Loftis* (Ohio), 15 R. R. R. 850, 38 Am. & Eng. R. Cas., N. S., 850.

Prethrow v. West Jersey & S. R. Co

Argued before MITCHELL, C. J., and MESTREZAT, FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

Edwin J. Sellers, for appellant.

Thomas James Meagher, for appellee.

FELL, J. The plaintiff purchased at the station of the defendant company in Gloucester, N. J., a ticket on which the following words were printed: "West Jersey & Seaboard Railroad Company. Good for one passage from Gloucester to Philadelphia, Market Street Wharf." The method of transportation was by railroad from Gloucester to the defendant's station in Camden, thence by ferry across the Delaware river to Market Street Wharf, Philadelphia. The ticket was taken up by the conductor on the train. When the ferryboat reached the Philadelphia side of the river, it ran into a bulkhead and the plaintiff was injured. The defendant offered no evidence at the trial but relied on two grounds of defense: (1) That the ticket sold by the defendant imposed no liability for the negligence of a connecting carrier, and there could be no recovery without evidence that the defendant operated the ferryboat; (2) that there was no affirmative evidence of negligence in operating the boat.

The ticket purchased by the plaintiff was a single ticket for the whole journey, and there was nothing on its face to indicate that any part of the transportation was to be by means of another carrier. It imported prima facie that the defendant owned or operated all the means of transportation between the points named on the ticket, and no question of the liability of a connecting carrier arose in the case. The plaintiff was a passenger injured through the means of transportation, and she might have rested her case on the proof of these facts, and relied on the presumption of negligence arising from them. She however produced testimony to show actual negligence and it is urged that this testimony rebutted the presumption, and exonerated the defendant from blame. The substance of this testimony was that, in order to avoid running into a tugboat which passed in front of the ferryboat, the latter was turned from its course down stream and brought nearly to a stop; that after this the pilot seemed to have lost control of the boat and in the effort to get back to the dock after the tugboat had passed he ran the ferry with great force into the bulkhead. Which boat had the right of way did not appear, but if we assume that the pilot of the ferryboat was not negligent in not sooner stopping or turning from his course, the emergency in which he was suddenly called to act had passed and the collision with the bulkhead occurred when he was trying to get back to his course. The question of his negligence was therefore for the jury.

The judgment is affirmed.

ILLINOIS CENT. R. CO. *v.* JOHNSON.

(Supreme Court of Illinois, April 17, 1906.)

[77 N. E. Rep. 592.]

Trial—Instructions—Assumption of Facts.—In an action against a railroad for causing the death of a passenger by alleged negligence in stopping its train, so that the car in which deceased was riding was beyond the end of the platform, in consequence of which deceased, while attempting to reach the platform, was struck by a train going in the opposite direction, an instruction that if the jury believe that defendant negligently operated its trains by running it past the station platform, and that by reason of "such negligent act" deceased was killed, the verdict should be for plaintiff, erroneously assumed that the running of the train past the platform was negligent.

Death—Measure of Damages—Instructions.—In an action for negligence causing death, an instruction to assess the damages at "such reasonable sum as plaintiff might be entitled to recover under all the facts and circumstances proved in the case," not exceeding the amount claimed in the declaration, was erroneous.

Carriers—Death of Passenger—Care Required of Carrier.*—In an action against a railroad company for alleged negligence causing the death of a passenger, an instruction that common carriers are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, was erroneous for failure to state that the degree of care required was only such as was consistent with the practical operation of the road.

Negligence—Children—Care Required.†—Children who have arrived at sufficient age to be capable of exercising some degree of care for their own safety must exercise the ordinary and reasonable care which ought to be expected of children of like age, capacity, intelligence, and experience.

*For the authorities in this series on the question of the degree of care required of a carrier of passengers, see foot-note appended to *Latour v. Southern Ry. (S. Car.)*, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379; *Southern Ry. Co. v. Cunningham (Ga.)*, 18 R. R. R. 374, 41 Am. & Eng. R. Cas., N. S., 374; foot-notes appended to *Chicago Union Traction Co. v. Newmiller (Ill.)*, 18 R. R. R. 273, 41 Am. & Eng. R. Cas., N. S., 273; *Williams v. Spokane, etc., Ry. Co. (Wash.)*, 18 R. R. R. 278, 41 Am. & Eng. R. Cas., N. S., 278; foot-notes appended to *Normile v. Wheeling Traction Co. (W. Va.)*, 18 R. R. R. 235, 41 Am. & Eng. R. Cas., N. S., 235.

†For the authorities in this series on the question of the degree of care required of children for their own protection, see foot-notes appended to *Murphy v. Boston Elev. Ry. Co. (Mass.)*, 17 R. R. R. 838, 40 Am. & Eng. R. Cas., N. S., 838; foot-notes appended to *Fishburn v. Burlington & N. W. Ry. Co. (Iowa)*, 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; foot-notes appended to *Christensen v. Oregon Short Line R. Co. (Utah)*, 16 R. R. R. 121, 39 Am. & Eng. R. Cas., N. S., 121; foot-notes appended to *Rohloff v. Fair Haven & W. R. Co. (Conn.)*, 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154.

Illinois Cent. R. Co. v. Johnson

Appeal from Appellate Court, First District.

Action by Hedwig Johnson, as administratrix of Carl Robert George Johnson, deceased, against the Illinois Central Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

Calhoun, Lyford & Sheean (J. G. Drennan, of counsel), for appellant.

Novak & Novak, for appellee.

CARTWRIGHT, C. J. This is an action on the case brought by appellee, as administratrix of the estate of her son, Carl Robert George Johnson, in the circuit court of Cook county, to recover damages from appellant for causing his death. The declaration alleged that the deceased, who was a minor, became a passenger on November 3, 1900, on one of the defendant's trains, in the front car next to the engine, at West Pullman station, to be carried to Pullman station; that the train arrived at Pullman station about 7:45 in the evening; that at Pullman station there was an elevated platform between the tracks for north-bound and south-bound trains for the use of passengers; that, when the train stopped at Pullman, the deceased left the car at the forward end, as was customary and as directed by defendant; that the train and car had passed by and beyond said elevated platform, and on leaving the car deceased found himself on the ground a few feet north of the elevated platform between said tracks, with the engine and cars on the east side and a vacant space on the west and a high picket fence across the platform on the south; that the depot and exit were on the west side, and as the deceased went from the place where he alighted, in a westerly and southerly direction, toward the gates, using due care, one of the locomotive engines of the defendant going in a southerly direction on the south-bound track struck and killed him. The plea was the general issue, and upon a trial the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$5,000. Judgment was entered on the verdict, and the judgment was affirmed by the Appellate Court for the First District.

The deceased was 14 years old, in good health, of fair intelligence, and was in a public school which he had been attending since he was six years old. His father and a sister and plaintiff, his mother, survived him. In the evening in question he went with a company from West Pullman to Pullman to attend a political celebration, and, with a number of the party, took a seat in the first car. The seats in that car extended to within 12 or 15 feet of the north end, which was vacant and used for baggage, and there were doors for baggage on the sides of the car. At Pullman station there was an elevated platform about 4½ feet above the ground and over 300 feet long, and the platforms of the cars

were provided with aprons, which, when let down, were level with the station platform and permitted passengers to walk directly upon the station platform without going down the steps. The track for north-bound trains was on the east side of the platform and one for south-bound trains on the west, and there was a picket fence at the north end of the platform. It was designed that the train should stop at the platform and passengers leaving the train would walk to the south end of the platform and cross the track for south-bound trains, to a turnstill, where the station building was located. When the train arrived at Pullman, at about 7:45, it was dark, and the first car passed the north end of the platform three or four feet. It does not appear that the deceased was acquainted with the place, and he, with a number of others, walked to the north door, in accordance with the direction posted in the car, to go out. Some one said that the train had passed the platform, and the others turned back. One of them pulled open the baggage door at the side of the car and a number went out there on the platform and others went to the rear, but the deceased, who seems to have been ahead of the others, went down the steps and started down the south-bound track when a train from the north was approaching. The headlights on both engines were burning, the bell on the south-bound train was ringing, the headlights on both trains could be seen for a mile, and there was an open space for a considerable width west of the south-bound track which was open and free from obstruction and which was 18 inches below the level of the track. When near the north end of the platform, as the engineer of the south-bound train was slowing up for the stop at the platform and was running about 12 to 15 miles an hour, he saw the deceased going south on the track ahead of the train and blew his whistle and endeavored to stop his train, but was not successful.

The instruction given at the request of the plaintiff, which purported to state the relative duties of the parties, the theory of the plaintiff and ground for recovery alleged in the declaration, and the amount of damages which might be awarded, was as follows: "The jury are instructed as a matter of law that if you find, from the evidence, that the defendant corporation was engaged in the business of transporting passengers and freight, for hire, upon a railroad operated by said company, then the law denominated the defendant a common carrier. The court instructs the jury that common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted to prevent accidents to passengers. So, too, persons who become passengers must at all times exercise ordinary care and caution for their own safety. And if the jury believe, from the evidence in this case, that the defendant was at the time of the accident a common carrier, and if you further believe, from the evidence, that the deceased was a passenger on the defendant's train and in the exercise of due care on his part, if the jury so believe from preponderance of the

evidence, and that the defendant carelessly or negligently operated its said train or car by running the same past the station platform, so as to cause the deceased to alight upon the ground and tracks of the defendant, instead of upon the platform where the passengers are usually unloaded, and that by reason of such negligent acts, if any are proven by the preponderance of the evidence in the case, of the defendant, their agents, and employees, the deceased, Carl Robert George Johnson, while exercising due care for his safety, if you so find from the preponderance of the evidence, was struck by an engine controlled and operated by the defendant and was then and there killed, then you may find the defendant guilty, and assess the plaintiff damages at such reasonable sum as she may be entitled to recover under all the facts and circumstances proved in the case, not exceeding \$5,000."

The instruction was erroneous in three respects. It was proved, and not disputed, that the train ran three or four feet past the north end of the platform, and that deceased alighted upon the ground, instead of on the platform where passengers were usually unloaded. The questions in dispute were whether the act of defendant in running past the platform constituted negligence on its part, and whether such act caused the deceased to alight upon the ground at an improper place, or whether he was negligent in going down the steps where he did. They were questions of fact for the jury to determine from the evidence, and it was the exclusive province of the jury to determine whether the act of the defendant was negligent and whether the deceased was guilty of negligence. No other act of the defendant was alleged and no other fact stated in the declaration which could have been construed to be a negligent one, and the court could not say that either of the parties was negligent as a matter of law. The Appellate Court, in considering whether the evidence warranted the jury in finding the defendant guilty of negligence which caused the injury, expressed no opinion as to whether the running of the train past the station platform constituted negligence or not, but held that the defendant was negligent in the management of the south-bound train, saying that it was the duty of the engineer to have been on the lookout for the north-bound train; that he must have known his train was late; that he ran the train at the rate of from 12 to 15 miles an hour; and that the evidence tended to show he did not exercise the required degree of care in the operation of his train so as to be able to stop for the safety of passengers getting on or off the north-bound train. There was no averment in the declaration as to the speed of the south-bound train or failure to keep a lookout, or mismanagement of it in any respect. The crossing place for passengers was south of the platform, more than 300 feet distant, and where the train would have come to a full stop; and, if the question as to the management of the south-bound train had been submitted to the jury, they would doubtless have considered the question whether the engineer had, or ought to have had, any reason to expect that a per-

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son would be on the track at the north end of the platform. It appears, however, that such questions were not submitted, and that the verdict was based on the negligent character of the act in running past the platform. On that question the instruction assumed both that the act was a careless and negligent one, and that it caused the deceased to alight upon the ground on the tracks of the defendant, instead of upon the platform, and it afterward refers to the acts as "such negligent acts." The plaintiff was entitled to recover if the jury should decide that the act of the defendant was negligent, that it caused the injury, and that the deceased was in the exercise of ordinary care; but it was the exclusive province of the jury to determine those facts, and they should have been submitted to the jury for determination without any intimation or assumption as to the proper conclusion. In the case of *Chicago & Northwestern Railway Co. v. Monranda*, 108 Ill. 576, the court said: "Where there is evidence before a jury upon which it is legally admissible there may be difference of opinion, it is error to allow any opinion of judge or court to be obtruded upon the jurors to influence their determination." Where the evidentiary facts will justify different conclusions, the questions of negligence is one of fact, and instructions should always be drawn so as to state the law upon a supposed or hypothetical state of facts, leaving the jury to find the fact. Instructions assuming the existence of any material fact have always been condemned. *Sherman v. Dutch*, 16 Ill. 283; *Michigan Southern & Northern Indiana Railroad Co. v. Shelton*, 66 Ill. 424; *Chicago & Eastern Illinois Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Swigart v. Hawley*, 140 Ill. 186, 29 N. E. 883; *Illinois Central Railroad Co. v. Griffin*, 184 Ill. 9, 56 N. E. 337; *Allmendinger v. McHie*, 189 Ill. 308, 59 N. E. 517; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Banfill*, 206 Ill. 553, 69 N. E. 499. Under this instruction, when the jury found that the train was run past the platform, they would understand that the court regarded such act to be a careless and negligent operation of the train, and that it caused the deceased to get off the train at the place where he did. It did not call upon the jury, as it should have done, to decide whether the act constituted negligence on the part of the defendant.

Under the instruction authorizing the jury to assess the plaintiff's damages at such reasonable sum as she might be entitled to recover under all the facts and circumstances proved in the case, not exceeding \$5,000, the jury went to the limit and returned a verdict for that sum. In the case of *Muren Coal & Ice Co. v. Howell*, 204 Ill. 515, 68 N. E. 456, the trial court instructed the jury that, if they found the defendant guilty, it would be their duty to assess the plaintiff's damages, and gave the following direction: "And in doing so you may take into consideration the pecuniary injuries resulting to the widow and next of kin, if, from the evidence, you believe there is a widow and next of kin, and that they have suffered pecuniary injury or loss on ac-

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count of the death of said August Schmidt, and give to the plaintiff such a sum as in your judgment will fairly compensate the widow and next of kin for such pecuniary injury or loss, not to exceed, however, the amount sued for in this case." It was held that the instruction was erroneous, and for that error the judgment was reversed. The court reviewed the previous decisions where it was considered that such an instruction did not limit the jury to the actual pecuniary damages sustained as established by the evidence, but left them free to give such sum as in their opinions of right or wrong would fairly compensate the widow and next of kin for the pecuniary injury or loss. The instruction in this case is much more objectionable than the one in that case, as it does not even limit the jury to estimating the compensation for pecuniary injury or loss, but authorizes the jury to assess the plaintiff's damages at such reasonable sum as in their judgment she may be entitled to recover. It refers to the facts and circumstances proved in the case, which were the facts and circumstances already detailed. It did not require that the assessment should be based on the evidence as to damages for which the law allows a recovery, but authorized the jury to give such damages as in their opinion plaintiff ought to have under all the facts and circumstances. In the case of *North Chicago Rolling Mill Co. v. Morrissey*, 111 Ill. 646, the judgment was reversed for error in giving an instruction that the jury "may give such damages as they shall deem a fair and just compensation for the pecuniary loss resulting from such death to the widow and next of kin of the deceased, not exceeding \$5,000"; and in the cases of *Keightlinger v. Egan*, 65 Ill. 235, *Chicago, Rock Island & Pacific Railroad Co. v. Austin*, 69 Ill. 426, *Waldron v. Marcier*, 82 Ill. 550, *City of Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407, and *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 66 Am. St. Rep. 296, similar instructions were held to be erroneous. In view of the amount of the verdict, the error in giving this instruction must be held to have been material and prejudicial.

The third objection to the instruction is that it stated the duty of a common carrier of passengers too broadly in omitting the qualification that the degree of care is to be consistent with the practical operation of the road. *Chicago & Alton Railroad Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578. But that objection is of minor importance, and, if it were the only one, might not require a reversal. An instruction was given which stated that the law does not require that a boy of the age of the deceased should necessarily exercise the same degree of care and caution as a person of mature years, but only such care and caution as persons of his age and discretion would ordinarily use under all the facts and circumstances proved in the case. In the case of adults there is a fixed standard by which to measure the degree of care required, but in the case of a child there is no exact standard. Children who have arrived at sufficient age to be capable of exer-

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cising some degree of care for their own safety must exercise the ordinary and reasonable care which ought to be expected of children of like age, capacity, intelligence, and experience. 1 Thompson on Negligence, § 309; Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 63 N. E. 1008. In this case there was no evidence to take the deceased out of the ordinary class of boys of his age in respect to capacity, intelligence, or experience, and the omission of some of the elements to be considered may not have been of much importance.

Because of the material and prejudicial errors which have been pointed out, the judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

INDIANAPOLIS TRACTION & TERMINAL CO. v. LAWSON.

(Circuit Court of Appeals, Seventh Circuit, February 6, 1906.)

[143 Fed. Rep. 834.]

Carriers—Liability for Injury of Free Passenger.*—A passenger on an electric car, although carried free, is still a passenger, and the carrier owes him the duty of exercising such skill as is consistent with the situation and the service undertaken and the greatest possible care for his safety, and any negligence by which the passenger is injured is actionable.

Same—Action for Injury to Passenger—Instructions.—Defendant, an electric street railroad company, offered the free use of three of its cars to take members of a women's convention for a ride about the city. The offer was accepted, the plaintiff's ward became one of the passengers, and was injured in a collision. The cars were operated by the regular employees of defendant. Held, that in an action to recover for the injury an instruction that defendant was liable for want of ordinary care, and that the burden of proof to show negligence rested on the plaintiff, was at least sufficiently favorable to defendant.

Appeal—Review—Harmless Error—Pleading—Variance.—Under Burns' Ann. St. Ind. 1901, § 394, which provides that no variance between the complaint and evidence shall be deemed material unless

*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to Chicago & A. R. Co. v. Walker (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to Illinois Cent. R. Co. v. Proctor (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

For the authorities on the subject of the degree of care required of a carrier of passengers, see foot-notes appended to Philadelphia, etc., R. Co. v. Allen (Md.), 18 R. R. R. 581, 41 Am. & Eng. R. Cas., N. S., 581; Southern Ry. Co. v. Cunningham (Ga.), 18 R. R. R. 374, 41 Am. & Eng. R. Cas., N. S., 374; foot-notes appended to Williams v. Spokane, etc., Ry. Co. (Wash.), 18 R. R. R. 278, 41 Am. & Eng. R. Cas., N. S., 278.

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defendant was actually misled to his prejudice, and which also requires the defendant to call attention to the fact, and authorizes the court to order the pleadings amended to conform to the proof, where no objection on the ground of a variance was made during a trial, the action of a court in construing the complaint in its charge as covering the case made by the proof, even if such construction was erroneous, did not constitute error prejudicial to the defendant, since the court had power to order the complaint amended.

In Error to the Circuit Court of the United States for the District of Indiana.

Action at law to recover damages for personal injury to the ward, Ada M. Lawson.

It appears that on May 14, 1903, the order of Royal Neighbors, an auxiliary to the Modern Woodmen, and composed of women, was holding a national convention in the city of Indianapolis, the ward of the defendant in error being in attendance. Some time prior to the convention a committee of the society solicited a donation from the plaintiff in error. The committee was informed that the company could not make a donation, but would arrange for three of its street cars to be placed at the disposal of the committee for the entertainment of their guests by trolley ride. The committee thereupon caused an invitation to be issued to the assembled delegates, and a large number of the delegates availed themselves of the invitation, and boarded the cars for the purpose of an excursion through the principal parts of the city. During the progress of the ride a collision occurred between two of the cars in which Mrs. Lawson was injured. It further appears that the three cars were in charge of the regular conductors and motormen employed by the company, and the jury found that the company, and not the delegates being carried on the cars, was in control of these conductors and motormen. Defendant in error recovered a verdict for \$8,000, upon which judgment was entered June 17, 1905, and to review such judgment this writ of error is brought.

At the beginning of the argument defendant in error by petition suggested the death of his ward, Mrs. Lawson, after judgment and writ of error, and that he had been duly appointed administrator of her estate; and asked to be substituted in his capacity as such administrator for himself in his capacity as guardian. His motion was granted by the court.

Wm. H. Latta, for plaintiff in error.

Percy D. Godfrey, for defendant in error.

Before GROSSCUP and KOHLSAAT, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). The court submitted to the jury the question whether the company or the excursionists were in control of the cars which collided, by whom they were run and operated, and who had control of the

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conductors and motormen. The jury was also instructed as a matter of law that the company, having done something it was not obliged to do as a common carrier of passengers, and having made a particular arrangement, as to the carriage, thereby came into the relation of a private carrier to Mrs. Lawson as a passenger, if the jury should find that the company was in control of the cars and conductors and motormen; that the company was required to use that degree of care that men of ordinary prudence use under like circumstances, and was liable for a failure therein; and that the burden of proof, on all the issues, was upon defendant in error, and not upon the company. The question of proximate cause was also fully submitted.

A large number of errors were assigned, two of which were pressed on the argument, to the effect that as the company was not a common carrier as to Mrs. Lawson, but only a private carrier, and as the service was gratuitously undertaken, it was liable only for gross negligence. Also that the complaint having counted on the relation of common carrier and passenger, defendant in error could not recover, on the theory that the company was a private carrier, liable only for ordinary neglect, instead of a common carrier, chargeable with the highest degree of care; and that there was a fatal variance between pleading and proof. It is insisted on the part of the company that the parties never came into any legal relation. It is said a donation was requested, and a street car ride offered and accepted; a pure gratuity, without consideration of any kind. This, it is said, removes the case from that large class into which considerations of public policy enter, since by their conduct the parties have voluntarily separated themselves from the great class of carriers and passengers for hire, and no consideration of public policy in any way affect the contract made, or the legal effect of the acts of the parties; that in all private affairs no one is bound beyond voluntary obligations expressed or implied by the contract; and the only thing the company agreed to do was to deliver the cars to the delegates, and surrender to them their control. Having done this it fully complied with every obligation assumed by it, and beyond this it cannot be held.

The position taken by counsel for plaintiff in error is seriously impaired by the finding of the jury that the company actually did run and operate the cars, through its servants, and that the delegates did not control those servants, nor manage the cars. Such position is further opposed by the consideration that even in a private, gratuitous mandate, or bailment of services, the bailor is obliged to use such skill as he possesses, and which is consistent with the situation, the service undertaken, and his profession, business, habits, and position; and that a failure to bestow this degree of care will constitute actionable negligence. *Shiells v. Blackburne*, 1 H. Bl. 158; *Conner v. Winton*, 8 Ind. 315, 65 Am. Dec. 761; *Wilson v. Brett*, 11 M. & W. 113; *Mariner v. Smith*, 5 Heisk (Tenn.) 208; *Preston v. Prather*, 137 U. S. 609, 11

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Sup. Ct. 162, 34 L. Ed. 788; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 813, 32 L. R. A. 773, 39 Am. St. Rep. 172. And finally, it is also well settled that a passenger carried free is still a passenger, as fully as if he pays fare. *Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Steamboat v. King*, 16 How. 469, 14 L. Ed. 1019; *Keep v. Railway Co.* (C. C.) 9 Fed. 625. The basis of this rule is, that where a carrier, common or otherwise, undertakes to carry persons by an irresistible and highly dangerous agency public policy and safety require that it should be held to the greatest possible care and diligence. Whether the consideration for the transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross." Mr. Justice Grier, in *Railroad Company v. Derby*, *supra*. In these three respects the case differs, and differs radically, from the one stated by counsel for the company.

What was the understanding between the parties, in view of the verdict? It was agreed or understood that the company would give the delegates a free street car ride. This implied that it would furnish safe and suitable track, cars and appliances, the necessary power, and to apply that power skilled employees, who should be under the control of the company. All the excursionists did, or could do, was to direct when to go and where to go; the very important how to go was necessarily left to the motorman and conductors. All the skill and experience were with the company, all the inexperience with the excursionists. Is it possible that it could be considered lawful or proper for a carrier to be permitted to turn over the control of irresistible power on a public track, in crowded throughfares, to a company of women, and be responsible only for the reckless or grossly negligent use of such power by its own skilled servants? It is impossible to consider the case apart from consideration of public policy. The company was charged with the custody and care of human lives in a service voluntarily assumed, and it is of no importance whether it was in the technical relation of common carrier or not. *Keep v. Railway Co.* (C. C.) 9 Fed. 625, and note by Mr. Thompson. The trial court held, as matter of law, that the company was not a common carrier as to Mrs. Lawson, was liable only for a want of ordinary care, and that the burden of proof to show negligence was on the defendant in error, plaintiff below. That this was a position sufficiently liberal to the railway company already appears, and is also justified by the following considerations.

A public, common carrier of passengers is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike, and for a reasonable compensation, furnish reasonable ac-

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commodations, must continuously operate its line, and submit to reasonable regulation. It has the franchise of taking tolls, and, if a street railway corporation, the franchise of laying tracks in the streets, of stringing wires and setting poles, and the right of way over all private means of transportation. Owing these public duties, possessing these public franchises, and having the burden of caring for innumerable human lives, it is justly held to the highest degree of care and skill. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; *Simmons v. Oregon R. Co.*, 41 Or. 151, 69 Pac. 440, 1022; *Kennedy v. N. Y. C. R. Co.*, 125 N. Y. 422, 26 N. E. 626; *Steamboat v. King*, 16 How. 474, 14 L. Ed. 1019; *Indianapolis v. Horst*, 93 U. S. 296, 23 L. Ed. 898. This burden the company was bearing, and these public franchises it was employing, in carrying these delegates on this free ride. A passenger is one who undertakes, with the carrier's consent, to travel in the carriage of the latter, otherwise than in its service. *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450. It is the existence of a contract of carriage, express or implied, which distinguishes a passenger from an employee, a licensee, an invited person attending on a passenger, and a trespasser. 5 Encyc. of Law, 484, 485. Persons on trains who are present as friends or attendants of travelers are not passengers, and as to them the carrier owes only the duty of ordinary care. 5 Encyc. of Law, 513; *Fetter on Carriers*, § 237.

In view of these characteristics of common carrier and passenger, what was the relation of the parties? The carrier, engaged in the public service, deriving most if not all of its rights and privileges from the state or municipality, and charged with many duties imposed by public policy, gratuitously turns over the use of its facilities, its track, cars, power and servants, to a company of women, who unhesitatingly place themselves in its charge, relying on its skill and experience as a public carrier of passengers. Charged with the care of these precious lives, how can it be heard to urge that it lays down all the responsibilities incident to its important public position, and becomes like a private person doing a favor? Especially when its public and responsible position was the sole inducement to the so-called "private arrangement." At the very least the company was responsible for ordinary diligence, and liable for any want of ordinary care. The charge was sufficiently liberal to it; and we find no error in this respect.

It is further insisted by plaintiff in error that as the complaint charges the company with liability as a common carrier of passengers, and negligence in that relation causing injury to Mrs. Lawson as a passenger, there was a fatal variance between pleading and proof. The trial court held that the relation was that of private carrier and passenger; that the company was not charged with the liability of common carrier, but for a want of ordinary care only; and that the burden of proof was on the defendant in error on all the issues of the case. This is assigned as error,

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on the ground that under the pleadings the company could be held liable only upon the theory of a violation of its duty as a common carrier, and not as a private carrier; that the company was only called on to defend as to the theory alleged in the complaint; that while a common carrier is required to use the highest degree of diligence a private carrier gratuitously is a mere mandatary, liable only for gross negligence; and that all the evidence offered was admissible because, if it had been supported by other evidence showing that the company was actually operating the cars, and had agreed in its public capacity to carry Mrs. Lawson, this would have tended to support the case made by the complaint.

From what has been already said, it is apparent that no mistake was made in pleading. In any event defendant was not injured nor misled. We adopt the opinion of the trial court on the motion for a new trial, as follows: The complaint stated a cause of action. The proofs established a cause of action. The defendant, claiming that there was a variance between the case stated in the complaint and that established by the evidence, presented instructions which would take the case from the jury. Section 394 of the Indiana Code (Burns' Ann. St. 1901) provides that no variance between the complaint and the evidence shall be deemed material unless the defendant is actually misled to his prejudice in maintaining his defense. The same section requires the defendant to call the court's attention to such fact, "and thereupon the court may order the pleadings to be amended on such terms as may be just." A similar provision of the Wisconsin Code was considered by the Court of Appeals of this Circuit in *Walsh v. McColclough*, 56 Fed. 778, 6 C. C. A. 114. See, also, the *Tremolo Patent*, 23 Wall., on page 527, 23 L. Ed. 97, and *Graffam v. Burgess*, 117 U. S., on page 194, 6 Sup. Ct. 686, 29 L. Ed. 839. The better considered Indiana cases are to the same effect. *Louisville, etc., R. R. Co. v. Hollerbach*, 105 Ind. 137, 5 N. E. 28, and *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. 316.

Section 399 of the Indiana Code authorizes the court, at any time, in its discretion, to direct any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendments do not substantially change the claim. So, even if it were conceded to be error for the court to construe the complaint as was done in the court's instructions, the error would be harmless, because such action of the court would amount to no more than if the court had directed the complaint to be amended to conform to the proofs.

This was the second trial of the case. The defendant failed to object to the plaintiff's evidence on the ground that the case being established by the proofs was at variance with the case pleaded, made no motion at the conclusion of the plaintiff's evidence, and at no time made any claim of surprise or prejudice, or that it was misled to its injury in maintaining its defense.

Westcott v. Seattle, etc., Ry. Co

The general nature of the plaintiff's claim was that his ward, at a named time, and place, while lawfully on one of the defendant's cars, was injured through the negligence of the defendant's servants. There can be no question but that the present judgment is a complete bar to any further action on account of that injury.

The judgment of the Circuit Court is affirmed.

WESTCOTT et ux. v. SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington, Feb. 16, 1906.)

[84 Pac. Rep. 588.]

Carriers—Injury to Passenger—Injury from Dog in Car.—A carrier was liable for injuries inflicted upon a passenger by a dog brought into a street car by another passenger and permitted to remain there.

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by F. H. Westcott and another against the Seattle, Renton & Southern Railway Company. From a judgement in favor of plaintiffs, defendant appeals. Affirmed.

Peters & Powell, for appellant.

Robert A. Devers, for respondents.

PER CURIAM. This action was brought by the respondents, to recover for damages to the clothing and to the sensibilities of respondent, Margaret Westcott, while a passenger upon one of appellant's cars. These damages were inflicted by a four months old puppy, brought into the car by another lady passenger, and permitted by the conductor to remain there. Verdict was rendered in favor of the respondents, judgment was entered thereon, and from such judgment this appeal is taken.

A street car company has no right to carry dogs upon a coach that is set apart for passengers, and if it does so, and damage is caused by said dog, it must respond to the same. There being no errors in instructions, or in the admission of testimony, the judgment is affirmed.

HILBORN v. BOSTON & N. ST. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, March 2, 1906.)

[77 N. E. Rep. 646.]

Carriers—Injury to Passenger While Alighting—Negligence.—In an action against a street railroad company for personal injuries to a passenger, who stepped into an open place between the car steps and the platform while alighting from the car at a subway station, neither the stopping of the car at a curved portion of the platform, the failure of the company to use wider or longer cars, nor its failure to give warning of the space between the car step and the platform was negligence, in the absence of any showing that the car was not stopped at a proper place, or that wider cars could have been used.

Exceptions from Superior Court, Suffolk County; Jabez Fox, Judge.

Action by one Hilborn against the Boston & Northern Street Railway Company. There was a verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

F. E. Crawford, for plaintiff.

Henry F. Hurlburt and *Damon E. Hall*, for defendant.

SHELDON, J. The plaintiff brings this suit to recover for personal injuries received while she was alighting from one of the defendant's cars at the subway station in Scollay Square. The car was a closed car of the shorter or four-wheeled type. The station platform here runs nearly north and south, and has a curve at the south end, which begins about 16 feet from the end of the platform, curving away from the tracks. This car was the first car in the station, and it was stopped not along the straight portion of the platform, where all parts of the car would have been equally distant from the platform, but on the curve, so that the front steps of the car, from which the passengers were directed by the conductor to alight, were farther from the platform than they otherwise would have been. The plaintiff's husband testified in her behalf that he estimated the space between the car steps and the platform to be 16 to 18 inches, and that the distance from the steps of other cars to the platform where it was straight was from 10 to 12 or possibly 13 inches. A civil engineer called by the defendant testified that the distance from the steps to the curved part of the platform where this car stood was by measurement 14½ inches. The plaintiff was about four feet tall. This was the first time she had been in the subway; but she had been accustomed to riding on steam and electric cars. She was accompanied by her husband. She testified that there were several other passengers in the car, and, in leaving the car, she preceded her husband, and was preceded by

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other passengers. There was no crowding or jostling or hurrying as the passengers alighted. While stepping off the car, she fell into the space between the car steps and the platform, and received the injuries complained of. She testified that she had to take some kind of a step to get off the car, but she did not know and did not pay any attention as to whether she had to step down to the ground or out upon a platform as she was alighting; that she saw the passengers ahead of her stepping off, but did not know whether they stepped down to the ground or not; that she started to step off and went down; that she was looking down toward the floor of the car; that when she looked down she could not see, but that it all looked alike to her; that she was not thinking of what kind of a step she was going to make. She also said that if she had seen the platform she could have stepped over onto it by taking an extra long step, by stepping a little further than usual, and that if she had looked a little more closely, she would perhaps have seen the space into which she fell, and might have avoided stepping into it. She testified that no one warned her of the width of this step, or said anything to her about it. It was agreed that the subway was lighted at the time of the accident; and the plaintiff testified that an arc light was burning within a short distance from the place where she fell, so that she could see objects distinctly, and that very likely it was light enough for her to have seen the space between the car and the platform if she had desired to notice it. The plaintiff's husband testified in her behalf that she went out of the car ahead of him; that before she left the car he told her to be careful when she was going out; that he saw her fall, and said, "My Lord! can't you see where you are going?" that he supposed his wife could have seen the step there; that he had been in the subway before, and had seen the step over to the platform, and that if he had thought that day, he might have warned her about the step across, but that he did not tell her about the step specifically.

It was agreed at the trial that the subway and the stations in it were constructed by the Boston Transit Commission, and are owned by the city of Boston; that the platform at this station is now of the same width, and in the same condition as constructed by the transit commission; that the Boston Elevated Railway Company operates its cars in the subway under a lease of the subway, and that the defendant operates its cars therein under permission of said elevated company authorized by the Legislature; that the elevated company has the entire management, charge, and control of the subway, the stations and platforms, except that it can make alterations therein only by the permission of the Boston Transit Commission. The defendant asked the judge to make many different rulings, of which the first three were that upon all the evidence the plaintiff was not entitled to recover, that the plaintiff was not in the exercise of due care, and that it did not appear that the defendant or its agents or

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servants were negligent; but the judge submitted the case to the jury, and after a verdict for the plaintiff, the case comes before us upon the defendant's exceptions.

1. We do not see how the plaintiff properly could be found to have been in the exercise of due care at the time of the accident. She knew that she must step either down or off upon a platform. It was light enough for her to see what kind of a step was necessary. She substantially agrees that, if she had looked, she would have seen the space over which it was necessary to step, and could have made the step in safety. *Ryan v. Manhattan Railway*, 121 N. Y. 126, 133, 134, 23 N. E. 1131. Her husband, who was immediately behind her, foresaw no difficulty in her observing the step, which she was to make, and expected her to see it. There always must be a space between the steps of a car running through the subway and the platform upon which passengers are expected to alight, and passengers, must expect this to be so. In this case, the space was somewhat greater than has come before the court in previous cases; but the plaintiff agrees that if she had had in mind the existence of any space, she could have seen what it was, and could have stepped over it safely. Her own bodily infirmity required her to exercise a higher rather than a lower degree of care.

2. But however this may be, we are of opinion that there was no evidence of negligence on the part of the defendant. It is not claimed that the defendant could have made any change in the platform at this station, or was in any way responsible for the manner of its construction. But it is argued that it might have been found to be negligent in not stopping the car along the straight edge of the platform, in running short, four-wheeled cars into the subway instead of longer or wider ones, and in failing to warn the plaintiff of the unusual width of the space between the car and the platform. We consider these suggestions in their order.

It is matter of common knowledge that in the stations for surface cars in the subway, the place for the car that comes first to stop is assigned and marked, so that passengers may know where to expect it, and so that room may be left for other cars that may arrive before the first car has departed. It is the duty of the defendant in running its cars in the subway to comply with whatever reasonable regulations in this behalf have been adopted by the Boston Elevated Railway Company, the lessee of the subway. There is no suggestion, and there was no evidence, that this car was not stopped in the proper place assigned for that purpose; being, as it was, the first car in the station. Nor can it be said that it is negligent to stop a car at a platform on a curve. *Welch v. Boston Elevated Railway*, 187 Mass. 118, 72 N. E. 500. The burden is on the plaintiff to show negligence of the defendant; and it cannot be assumed without some proof. It does not appear that the place for the stopping of the car was or could be selected by the servants of the defendant, and the

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decisions from other states cited by the plaintiff upon this question have accordingly no bearing. Negligence cannot be found in this respect. Nor can it be said that there is evidence that the defendant ought to have selected cars either longer or wider than the one actually used for running into the subway. It is plain that with a longer car the space between the car steps and the curving part of the platform would have been greater rather than smaller. It does not appear that wider cars could safely have been run over the defendant's tracks. In the absence of any evidence, it was mere matter of speculation whether wider or differently constructed cars practically could have been used in the different places, and under the different circumstances necessary to be provided for. Here, again, it was for the plaintiff to prove the negligence upon which she relied; and we find no evidence on which it can be said that this was done.

There was no warning by the defendant's servants of the width of this step; and the plaintiff argues that the failure to give such warning might be found to have been negligent, contending that if there is a dangerous place at the landing, it is the duty of the conductor to warn those who are stepping out, to give notice to all if any danger in alighting is probable. But it has been held that it is not negligence for the servants of a street railway company in charge of a car to fail to give notice of the existence of a space between the step of a car and the platform, or between the cars of an elevated train. *Welch v. Boston Elevated Railway*, 187 Mass. 118, 72 N. E. 500; *Falkins v. Boston Elevated Railway*, 188 Mass. 153, 74 N. E. 338; *Willworth v. Boston Elevated Railway*, 188 Mass. 220, 74 N. E. 333. In the first of these cases, there was no evidence what was the width of the space, except that it was wider than when the cars were on a straight part of the track; in the second, it was from 7½ to 10½ inches wide; and in the third, and also in *Field v. Boston Elevated Railway*, 188 Mass. 222, 74 N. E. 334, note, it was between 3 and 4 inches. But in *Ryan v. Manhattan Railway*, 121 N. Y. 126, 23 N. E. 1131, cited in *Willworth v. Boston Elevated Railway*, *ubi supra*, the plaintiff testified that she estimated by the eye that the space between the step and the platform was 14 or 15 inches wide. In *Fox v. New York*, 70 Hun. 181, 24 N. Y. Supp. 43, a case very similar to this, there was evidence that the width of the space was 20 inches. In *Rothchild v. Central Railroad*, 163 Pa. 49, 29 Atl. 702, the space was estimated to be from 16 to 18 inches. And in all these cases it was held that the existence of the space afforded no evidence of negligence.

Accordingly, we are of opinion that the defendant's three requests for instructions, which have been stated, should have been given; and it is unnecessary to consider the other questions which have been argued. Exception sustained.

PITTSBURGH C., C. ST. L. RY. CO. *v.* NICHOLAS.

(Supreme Court of Indiana, Jan. 5, 1906.)

[76 N. E. Rep. 522.]

Master and Servant—Injuries to Servant—Pleading—Negligence of Fellow Servant.—A complaint alleged that plaintiff was employed as a brakeman; that the conductor, whom he was bound to obey, directed him to go upon a car to set the brake; that said car should have been cut loose from the train to check its speed and stop it at the proper point; that under such order plaintiff was upon said car, but the conductor negligently failed to cut the car loose and negligently gave the engineer the signal to stop the engine suddenly, violently throwing plaintiff from the car. Held, that such complaint was sufficient to show that the conductor owed plaintiff the duty either to cut off the car himself or to cause it to be done before giving the signal for the sudden stopping of the engine.

Same.—Where a brakeman was directed by the conductor to go upon a freight car, and was injured by the conductor's negligence in giving orders as to the movement of the train, it was not necessary, in an action against the railroad company, to allege that the conductor knew of plaintiff's perilous position when the signal was given.

Same—Customary Methods.*—Every railroad company is charged with a continuing duty to exercise care for the safety of its servants, and cannot be absolved therefrom by suffering a negligent custom to be established in the conduct of its business.

Same—Assumption of Risk—Negligence of Superior.†—The assumption of the ordinary risks of the service of a brakeman does not include the unexpected and unknown negligence of a conductor while exacting and receiving implicit obedience to a specific order.

Evidence—Opinion of Experienced Witness.‡—The rule excluding opinions was not violated in admitting the testimony of witnesses experienced in the line of work covered by the testimony and possessing special knowledge and skill in that behalf.

Appeal—Admission of Testimony.—There was no reversible error committed by prematurely admitting evidence out of its logical order.

*See extensive note appended to *Tucker v. Boston & M. R. R.* (N. H.), 18 R. R. R. 294, 41 Am. & Eng. R. Cas., N. S., 294.

†See foot-notes appended to *Southern Ry. Co. v. Logan* (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374.

‡For the authorities in this series on the subject of the admissibility of expert and opinion evidence, see foot-notes appended to *Denver & R. G. R. Co. v. Scott* (Colo.), 17 R. R. R. 309, 40 Am. & Eng. R. Cas., N. S., 309; *Birmingham Ry. L. & P. Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; *Macon Ry. & Light Co. v. Mason* (Ga.), 17 R. R. R. 201, 40 Am. & Eng. R. Cas., N. S., 201; *German Ins. Co. v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

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Same—Harmless Error—Instructions.—In an action for injuries to a brakeman resulting from the negligence of defendant's conductor, where it was clear that plaintiff could not have anticipated the negligence which was the proximate cause of his injury, error in instructing that the burden of proving assumption of risk was upon defendant, if erroneous, could not have harmed defendant.

Same—Review—Sufficiency of Evidence.—Where the verdict of the jury is fully sustained by the evidence, it will not be disturbed on appeal on the ground of insufficient evidence.

Appeal from Circuit Court, Henry County; Jno. M. Morris, Judge.

Action by Howard E. Nicholas against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court (73 N. E. 195, 74 N. E. 626), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Jno. L. Rupe and L. P. Newby, for appellant.

W. J. Beckett and Elliott, Elliott & Littleton, for appellee.

MONTGOMERY, J. Appellee brought this action for damages resulting from a personal injury received while in the employ of the appellant as a brakeman, and recovered a judgment of \$7,500. This judgment was affirmed by division No. 1 of the Appellate Court, and from that division this appeal is prosecuted.

By proper assignment of errors it is charged in substance that the decision of the Appellate Court is erroneous in holding that the circuit court did not err in overruling (1) appellant's demurrer to the complaint, (2) its motion for judgment upon the answers of the jury to special interrogatories, and (3) its motion for a new trial. It appears from the complaint that appellee was employed in appellant's yards in the city of Indianapolis, and at the time of receiving his injury was engaged in making up trains; that the conductor to whose orders he was bound to conform, desiring to place a certain refrigerator car on a particular track, directed him to go upon the car for the purpose of setting the hand brake thereon, after said car should have been cut loose from the train or cut off cars to which it was attached, and thereby checking its speed and stopping it at the proper point; that in pursuance to such order, and in conformity thereto, appellee was at his post upon said car, and the conductor ran the train upon said track, but negligently failed to cut said car loose from the train and engine to which it was attached and which was propelling the same, and without having done so, or knowing that the same was done, negligently gave the engineer in charge of said engine a signal to stop said engine suddenly and quickly, whereby the car upon which appellee was stationed was caused to stop suddenly, and he was thereby violently thrown from the top of said car to the ground beneath said train, and injured.

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The complaint is in a single paragraph, and the cause of action stated is founded upon section 7083, Burns' Ann. St. 1901, known as the "Employers' Liability Act." It is conceded by appellant's counsel that the complaint sufficiently shows that at the time of receiving his injury appellee was acting under orders of a superior, to whose orders he was subject and required to yield obedience.

It is insisted that negligence on the part of the appellant is not sufficiently charged, because it is not alleged that it was the duty of the conductor to cut off said car, or that he knew of appellee's perilous position at the time he gave the stop signal of which complaint is made. It is shown that the conductor was in charge of the train and of the work in hand. In pleading it is not necessary that a duty be charged in specific terms, but it is essential and sufficient that particular facts and circumstances from which the duty arises be declared. It is a matter of common knowledge that the sudden stopping of an engine propelling a train of cars will result in a violent jerk of the cars at the end of the train remote from the engine. The conductor must have known this fact and its probable effect upon appellee, and his act in causing the train to be stopped in the manner and under the circumstances alleged was negligence. Taking all the averments of the complaint together, it does sufficiently appear that the conductor owed appellee the duty either to cut off the car himself, or to cause it to be done before giving the signal for a sudden stopping of the engine. It was not necessary to allege notice or knowledge on the part of the conductor of appellee's position on the car. It is averred that appellee was there in obedience and conformity to the specific order of the conductor, and, this being true, the conductor was bound to know and was chargeable with knowledge of his situation with all of its attendant perils. The negligence of appellant's conductor in causing the car and the train to be quickly and suddenly stopped as alleged was the proximate cause of appellee's injury, and as pleaded constituted a cause of action under the provisions of the statute mentioned. No error was committed in overruling appellant's demurrer to the complaint. *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420, 53 N. E. 927; *Terre Haute, etc., R. Co. v. Rittenhouse*, 28 Ind. App. 633, 62 N. E. 295; *Thacker v. Chicago, etc., R. Co.* 159 Ind. 82; 64 N. E. 605, 59 L. R. A. 792; *Republic, etc., Co. v. Burkes*, 162 Ind. 517, 70 N. E. 815.

The answers of the jury to special interrogatories show, among other facts, that under the common practice and manner of conducting work in the yards, after receiving instructions, brakemen were expected to look after their own safety in the movement of cars, without signals or warning, that it was the duty of the conductor to cut off said car before appellee fell from it, and that the accident occurred in the nighttime, about 3 o'clock a. m. It is argued that since appellee was expected to look after his own safety while engaged in moving cars appellant's conductor owed

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him no duty while giving the stop signal of which complaint is made. This argument is palpably untenable. Appellant is charged with a continuing duty to exercise care for the safety of persons in its service and under its control, and cannot be absolved therefrom by suffering a negligent custom to be established in the conduct of its business. Appellee's assumption of the ordinary risks of the service did not include the unexpected and unknown negligence of a superior servant while exacting and receiving implicit obedience to a specific order. The act of appellant's conductor in causing the sudden stoppage of the car was negligence, and by positive statute such negligence is made actionable when the injury results therefrom to one in the exercise of due care, while yielding compulsory obedience and conformity to the order of its author. Section 7083; Burns' Ann. St. 1901. American Rolling Mill Co. v. Hullinger, 161 Ind. 673, 680, 67 N. E. 986, 69 N. E. 460; Terre Haute, etc., R. Co. v. Rittenhouse, *supra*; Gould Steel Co. v. Richards, 30 Ind. App. 348, 66 N. E. 68; Reno Employers Liability Acts, §§ 247, 249; Woodward Iron Co. v. Andrews, 114 Ala. 243, 21 South, 440; Taylor v. Evansville, etc., R. Co., 121 Ind. 124, 131, 22 N. E. 876, 6 L. R. A. 584, 16 Am. Rep. 372. Appellant's motion for judgment in its favor was therefore rightly overruled.

In the motion for a new trial complaint is made of the admission of the testimony of certain railroad men as to the method of handling trains and cars in appellant's yards. These men are shown to have been experienced in the line of work covered by their testimony and to possess special knowledge and skill in that behalf, and the rule excluding opinions was not violated in admitting their testimony, nor was any reversible error committed by prematurely admitting this evidence out of its logical order.

Appellant complains of the giving of instruction No. 1, requested by appellee. This instruction informed the jury as to the issues, and advised them that appellee was entitled to recover if he had proved the material allegations of his complaint, and that the burden of proving the material allegations of the second paragraph of answer which charged an assumption of the risk was upon appellant. Appellant's counsel contend that the complaint was insufficient, and therefore establishing its averments would not justify a recovery. This contention has already been considered and held untenable. It is further insisted that the burden was not upon appellant to prove the allegations of its affirmative paragraph of answer. Appellee, under his relation to appellant, was required to obey the orders of the conductor over him, and in the performance of the work in hand at the time he was injured was conforming to a specific order of such conductor, and was not free from constraint. Assumption of risk rests upon voluntary action. It is, furthermore, clear from the facts in this case that appellee could not have anticipated the negligence which was the proximate cause of his injury, and as

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already said did not assume the risk arising from such negligence. It is, accordingly, manifest that the instruction complained of, if erroneous in the respect mentioned, was harmless. Charge No. 1, requested by appellant, was a peremptory instruction in its favor, and was properly refused. The refusal to give instruction No. 8, at the request of appellant, was clearly right.

We will not review the evidence in detail, as it establishes the material averments of the complaint, and fully sustains the verdict of the jury. We are not warranted in disturbing the judgment on the ground of insufficient evidence. *Missouri, etc., Ry. Co. v. Schilling*, 32 Tex. Civ. App. 417, 75 S. W. 64; *Quinlan v. Chicago, etc., R. Co.*, 113 Iowa, 89, 84 N. W. 960; *Highland Ave., etc., Ry. Co. v. Miller*, 120 Ala. 535, 24 South. 955; *Louisville, etc., R. Co. v. Smith*, 129 Ala. 553, 30 South. 571; *Bowes v. New York, etc., R. Co.*, 181 Mass. 89, 62 N. E. 949; *Texas, etc., R. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905.

It follows that no error was committed in overruling appellant's motion for a new trial.

The judgment of the Henry circuit court is affirmed.

CITY OF DETROIT *v.* C. H. LITTLE CO.

(Supreme Court of Michigan, Nov. 13, 1906.)

[109 N. W. Rep. 671.]

Eminent Domain—Grade Crossings—Separation of Grade—Damages to Leasehold.—In a proceeding by a city for the separation of street and railroad crossing grades, it was not error to refuse to adopt as a tenant's measure of damages the value of his term less the rent reserved, the tenant being entitled in addition to compensation for the interruption of his business and damage thereto caused by the changed condition of the locality.

Railroads—Lease of Right of Way—Public Policy.*—A lease by a railroad company of a portion of its right of way for business purposes with a view to securing freight is not contrary to public policy.

Eminent Domain—Separation of Railroad and Street Grades—Removal of Buildings.—Where a city permitted certain streets to be torn up and rendered impassable before taking necessary legal proceedings for the separation of certain grades, it could not object that, because the holder of an adjoining leasehold moved its buildings before such judicial proceedings were instituted, it could not recover damages for such removal.

*See generally, foot-note appended to *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (Md.), 19 R. R. R. 581, 42 Am. & Eng. R. Cas., N. S., 581; *State v. New Orleans Warehouse Co.* (La.), 7 R. R. R. 334, 30 Am. & Eng. R. Cas., N. S., 334 (power of railroad to lease portion of property for hotel purposes).

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Evidence—Admissions by Attorney—Former Trial.—In a proceeding for the assessment of damages to a leasehold caused by the separation of grades and the abolition of a railroad grade crossing, an admission made by petitioner's attorney for the purpose of expediting a former trial, to the effect that defendant's witnesses, if called, would testify that defendant's damages amounted to a specific sum, was properly rejected.

Trial—Misconduct of Counsel—Condemnation Proceedings.—An allowance of damages in condemnation proceedings should not be set aside for improper argument of defendant's counsel as to the damages recoverable where the court has carefully charged the proper rules for the determination of the damages sustained, and instructed the jury to disregard the argument complained of, unless it is probable that the argument affected the verdict.

Eminent Domain—Damages—Separate Improvements.—Where proceedings were instituted for the separation of grades and the abolition of certain railroad grade crossings, the owner of a leasehold could only recover damages sustained because of the improvement on which his property abutted.

Appeal from Recorder's Court of Detroit; William F. Connolly, Judge.

Petition by the city of Detroit for the separation of railroad and street grades against the C. H. Little Company, impleaded, etc. From a judgment awarding damages, both parties appeal. Affirmed.

Argued before GRANT, BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ.

P. J. M. Hally, for petitioner.

Willard E. Warner, for respondent.

BLAIR, J. On July 3, 1903, the city of Detroit entered into an agreement with the Lake Shore & Michigan Southern Railway company and other railway companies for the separation of grades at the intersections of the several streets in the district between Woodward and Michigan avenues, inclusive, with the rights of way of said companies. On November 3, 1903, the common council, by resolution, declared it necessary for the public benefit to make the separation of grades in accordance with the plan prescribed in the agreement. On December 16th, the city filed its petition as commencement of judicial proceedings for the separation of grades in accordance with the provisions of chapter 102, p. 1337, Comp. Laws 1897. Respondent was not mentioned in the proceedings, but on its petition, was permitted to implead and present its claim for damages. On the 19th of April, 1901, respondent entered into a lease with the Lake Shore Company, for the term of one year, covering a strip of land of 50 feet frontage on the south side of Michigan avenue by 220 feet depth upon the right of way of said company. The company's warehouse fronted on Michigan avenue with its east side

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on the west line of Clark avenue. The lease provided for annual renewals, and was renewed on April 19, 1903. The lease provided that it might be terminated by the lessor at any time upon 60 days' notice, and further provided that the lands leased "should be held by said second party for the purpose only of receiving, storing, handling and shipping sewer pipe, cement or other freight coming to or shipped by the said second party over the railway of the said first party." The work of separating the grades at intersections of the Michigan Central right of way, some 600 feet east of respondent's premises, was begun prior to respondent's removal of its buildings and property, and Michigan avenue from Clark and Scotten avenues east was practically impassable at that time. The work adjacent to respondent's premises under the Lake Shore contract was not begun, however, till September 22, 1903, several weeks after such removal. A further statement of facts will be found in *City of Detroit v. C. H. Little Co.* (Mich.) 104 N. W. 1108, in which case this court reversed the judgment of the recorder's court rendered upon the first trial of this matter. A second trial has been had, resulting in a verdict and judgment for respondent of \$474.76, and both parties have appealed to this court.

Counsel for the city insist that a verdict should have been directed in favor of the city for the reasons: "(1) The statute does not contemplate an award of damages to a steam railroad, and, since in case of injury to a leasehold interest the damages are to be apportioned, the Legislature has failed to provide damages for injury to the interest of a tenant of a railroad right of way. (2) The measure of damages is the value of the term less the rent reserved and there was no evidence of the value of the term. (3) The lease was against public policy, invalid, and respondent could obtain no rights under it."

1. This point is disposed of by our previous decision.

2. The court did not err in refusing to adopt as the measure of damages the value of the term less the rent reserved. *Railroad Co. v. Welden*, 70 Mich. 390, 38 N. W. 294; *Railroad Co. v. Chesebro*, 74 Mich. 466, 42 N. W. 66; *Commissioners v. Chicago*, etc., *Railroad*, 91 Mich. 291, 51 N. W. 934; *Commissioners v. Moesta*, 91 Mich. 149, 154, 51 N. W. 903; *City of Detroit v. Brennan*, 93 Mich. 338, 53 N. W. 525.

3. This point is disposed of by *Michigan Central Railroad Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635.

It was also contended by petitioner that, since respondent voluntarily moved its buildings before judicial proceedings were instituted to determine the necessity for the proposed separation of grades, he could recover no damages for such removal. Petitioner, having permitted the work of tearing up the streets to be begun and the streets to be rendered impassable before taking the necessary legal proceedings, is not in a position to object that respondent, in good faith, treated its unlawful proceedings as lawful and moved his buildings to lessen the damages.

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Respondent contends that the court erred: "(1) In refusing to receive evidence of an alleged admission of the amount of respondent's damages by petitioner's attorney on the former trial. (2) In permitting improper arguments to be addressed to the jury by counsel for petitioner. (3) In leaving the question to the jury whether or not the respondent was compelled to move by reason of the separation of grades. (4) In refusing to grant a new trial for the reason, among others, that the jury did not follow the uncontroverted testimony as to the amount of respondent's damages."

1. This point is disposed of by our previous decision. The admission was made for the purpose of expediting the trial, and was, in effect, that respondent's witnesses, if called, would testify that the damages amounted to \$1,807.40. The evidence was properly rejected.

2. We do not think the argument of petitioner's counsel, of which complaint is made, if erroneous, could have prejudiced the jury so far as respondent's damages are concerned, in view of the charge of the court upon that subject, which respondent's counsel concede was correct. We do not think that verdicts should be set aside in such proceedings upon the ground of improper argument as to the damages recoverable where the court has carefully given to the jury the proper rules for their guidance, and instructed them to disregard the argument principally complained of, as in this case, unless it seems probable that such arguments affected the verdict.

3. Among other things, the court instructed the jury as follows: "You are to say whether or not, as reasonable men, they were compelled to move by reason of the separation of grades. If they were compelled to move their warehouse, by reason of the separation of grades, you are to say, as reasonable men, under the evidence, what damage, what cost they were put to by reason of their moving." "Now, it is the claim of the petitioner here that there was no necessity imposed upon them by reason of the separation of grades to move at all from the old site; that is to say, they could have remained where they were and accommodated themselves upon the old site, to the new situation, and go on doing business there just the same. That is a proper element for you to consider in your award of damages, whether or not they were under the necessity of moving on account of the separation of grades, or of moving entirely to meet the expanding and growing needs of their business. What the statute contemplates is that they shall be justly compensated for any injury they may have received by reason of the separation of the grades, and by reason of nothing else than that." Respondent's counsel contend that the testimony of their witness Tucker, that "they were handicapped for room on the south side," etc., is only subject to the interpretation that such testimony related to the situation as it would exist after the excavation in front of the premises and with the building moved back on Clark avenue. We do not

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regard this as a necessary view of the testimony. The jury viewed the premises, and we think the court did not err in leaving it to them to determine from such view, from the fact that they moved the building back on the lot before work began in front of the premises, from the testimony of the witness and the surrounding circumstances, whether respondent did not move its buildings to meet the demands of its expanding business.

4. The items of respondent's damages as claimed were:

To paid extra men under Torrey.....	\$ 78 94
To paid extra man under Taylor.....	133 95
To value of double teams for extra time.....	1,236 00
To value of single wagons for extra time.....	484 40
To value of various items of expense.....	210 01
To value of damage to building.....	300 00

Total \$2,443 30

Interest on the above total from February 1st, 1904, the average date, \$261.85, which added to the above, makes a total of \$2,705.15.

The basis of the claim for damages "for extra time" of teams was, as testified by the foreman of the south yard and the man in charge of the teaming: "We kept an average of two double teams and one single wagon at that yard, and they would draw an average of six loads a day, each, from the south yard. After Michigan avenue became impassable, the hauls were much longer. From the south yard, we had to go south on Clark avenue to Toledo avenue, the first paved east and west street, then east or west on that avenue to the first paved street back to Michigan avenue and up that street to Michigan avenue again, making an extra distance of about two miles for each load. From the north yard we had to go north on Scotten avenue to Buchanan, the first paved east and west street, then east or west to the first paved street back to Michigan avenue, and down that street to Michigan avenue again, making an extra haul of about two miles for each load, just about the same extra distance on both sides of Michigan avenue. This extra distance for each load amounts to 12 miles extra travel for each team and wagon per day, or a loss of time which it takes the teams to go that extra distance. During the fall and winter of 1903-4 and the summer of 1904, Michigan avenue was in such shape that teams could not traverse nor cross it. We could not get from one yard to the other without going way around. During the later part of the work of improvement, teams could drive through Michigan avenue on the south half of the avenue, but we could not cross it until it was completed, which was some time in September, 1904. The single wagons ordinarily haul from 2,000 to 3,000 pounds to a load, and the double teams from 3,000 to 5,000 pounds per load. The teams have to keep on the paved streets with such loads. A double team with a man is worth 50 cents per hour, and a single wagon with a man is worth 40 cents per hour, the man in each case costing the same. In making deliveries from

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the south yard, on the south side of Michigan avenue during the time that Michigan avenue was impassable, the teams had to go south on Clark avenue to Toledo avenue, the first paved street running east and west, then east or west on Toledo to the first paved street running north and south, then north on that street back to Michigan avenue. From the yard on the north side of Michigan avenue, the teams had to go north on Scotten avenue to Breckenridge street, the first paved street running east and west, then east or west on that street to the first paved street running north and south, then south on that street back to Michigan avenue. This made an extra haul of about two miles for each load. A loaded team will not walk more than three miles per hour. Toledo avenue is just about the same distance south of Michigan avenue that Breckenridge is north of it. The teams returned by the same routes as going. To the south of Michigan avenue there is a short street between Michigan and Toledo, but it is not paved, and between Michigan and Breckenridge there are some unpaved streets. Our teamsters take the same route on the return as going. I did not go with every load, but drove around from day to day in a carriage to keep track of the teams and men. They could not deliver as many loads per day, going around the long way, as out by the way of Michigan avenue. I heard the testimony of Mr. Heiden as to the extra distances for the hauls and the extra time which it took, from which I have made the computations of the value of the teams and men for such extra time for an average of six loads per day for each team and wagon. For the double teams this amounts to the sum of \$1,236. For the single wagons this amounts to the sum of \$484.40. I have computed it for the period of one year, as it took that long at least when Michigan avenue was impassable for our teams; i. e., from the latter part of August, 1903, into September, 1904. It was a little longer than one year, but I have used that as a basis." This testimony is not very satisfactory. It does not appear how many loads were hauled during the year nor upon any given day, nor what route was traversed by any team, nor how far any particular team traveled, nor what the basis was of the witnesses' statement of the average number of loads, nor the weight of load that any particular team hauled, nor that all of the loads had to be drawn on paved streets, nor what time was consumed in returning with the empty wagons, nor what part of the extra haul was due to the separation of the Lake Shore grades alone, nor what effect, if any, the procuring of additional room upon the north side and the admitted expansion of the business had upon the number of loads hauled from the south side. None of the teamsters was called, and a part of the testimony, at least, upon this subject was based upon hearsay. Respondent was not entitled to recover any compensation for damages due to the separation of grades at the intersections of Michigan avenue or any other streets within the Michigan Central and Grand Trunk rights of way, but only for the Lake Shore

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improvement, upon which his property abutted. As to the other improvements, while the damages may have been greater to respondent than to others having occasion to use Michigan avenue, the difference was one of degree and not of kind.

Respondent's counsel admitted that they claimed nothing for loss of profits and it is fairly inferable from his statements that there had been no loss of profits. The judge who tried the case admitted it to the jury in a very fair, lucid, and comprehensive charge, and after considering respondent's motion for a new trial, said: "The case was, in my judgment, fully and fairly tried by 12 intelligent and impartial jurors, and I can see no reason at this time to disturb their verdict."

We are not prepared to say upon this record that his conclusion was erroneous. The judgment is affirmed.

CITY OF CHICAGO *v.* CHICAGO CITY RY. CO. *et al.*

(Supreme Court of Illinois, Oct. 23, 1906.)

[78 N. E. Rep. 890.]

Injunction—Prosecution for Crimes.—A court of equity has no jurisdiction to interfere with prosecutions for criminal offenses, whether under a statute applicable to the state at large, or under an ordinance in force only in a particular municipality.

Municipal Corporations—Street Railroads—Regulation—City Ordinances.*—Chicago Municipal Code, §§ 1958, 1959, as amended October 23, 1905, requiring street railways under penalty to furnish sufficient cars to prevent overcrowding, to keep them above a certain average temperature, to keep the track in such condition as to prevent unnecessary noise and jarring, etc., was within the power conferred on the city by Cities and Villages Act, art. 5, § 1, cl. 42 (Hurd's Rev. St. 1905, c. 24, § 62), giving cities power to regulate the occupation of street railway companies.

Same.*—Chicago Municipal Code, §§ 1958, 1959, as amended October 23, 1905, requiring the running of a sufficient number of street cars to prevent overcrowding, the furnishing of heat therein, etc., was within the police power of the city.

Injunction—Prosecutions for Penalties—Municipal Ordinance—Invalidity.—The mere invalidity of a city ordinance, under which certain street railway companies were prosecuted to recover penalties for violation thereof, affords no ground for the issuance of an injunction to restrain such prosecutions.

Same—Remedy at Law.—Where the invalidity of a city ordinance

*For the authorities in this series on the subject of the power of municipalities to regulate the operations, etc., of street railways, see foot-notes appended to *McHugh v. St. Louis Transit Co.* (Mo.), 17 R. R. R. 349, 40 Am. & Eng. R. Cas., N. S., 349; foot-notes appended to *Sluder v. St. Louis Transit Co.* (Mo.), 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293.

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under which many suits for separate penalties were brought against certain street railway companies had not been determined at law, and its invalidity was uncertain, such railroads were not entitled to maintain a bill of peace to restrain the prosecution of all the suits but one.

Same—Multiplicity of Suits.—Where two street railway companies in different parts of a city furnished practically all the street railway, service thereof, they were not entitled to maintain a suit in equity to, restrain a large number of prosecutions for violations of a city ordinance regulating such service, and to have the ordinance declared void because the maintenance of such bill would prevent a multiplicity of suits, for the reason that there were other persons and corporations, operating street railway lines in outlying districts, interested in the proceedings but not charged with a violation of the ordinance.

Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Bill by the Chicago City Railway Company and others against the city of Chicago to enjoin the enforcement of a city ordinance and to restrain the prosecution of certain suits for the recovery of penalties. From a decree in favor of complainants, defendant appeals. Bill dismissed.

J. G. Grossberg (*James Hamilton Lewis*, Corp. Counsel, of counsel), for appellant.

John P. Wilson, *E. R. Bliss*, *John J. Herrick*, *W. W. Gurley*, and *John S. Miller* (*John J. Herrick*, of counsel), for appellee.

CARTWRIGHT, J. On October 23, 1905, the city council of the city of Chicago, appellant, passed an ordinance amending sections 1958 and 1959 of the Revised Municipal Code of the city so as to read as follows:

"1958. (Comfort and Safety of Passengers.) It shall be unlawful for any person or corporation owning, leasing, or operating any street railway cars, or other vehicle for the transportation of passengers for hire, within the city of Chicago, to permit any car or other such vehicle to be in use or to be operated on any of the public streets or ways of said city unless the average temperature within such car be maintained at not lower than fifty degrees Fahrenheit; nor unless said car shall be reasonably clean, disinfected, and so ventilated as to be as free as practicable from foul or vitiated air; nor unless said car contains a standard Fahrenheit thermometer, in good order, securely fastened to the wall of the car, near the center thereof, on the opposite side from the stove or heater, if there be one, and so placed as to give the average temperature of said car and be conveniently visible for examination by the passengers thereon; nor unless there be maintained in said car, in a position conveniently accessible to passengers, a copy of this section so posted that it may be conveniently read by occupants of the cars, together with a statement that passengers are invited to report violations of this section to the commissioner of public works at the city hall; nor unless the track upon which such cars is operated,

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and the car itself, are in such condition as to insure and provide the reasonably safe, convenient and comfortable transportation of its passengers, without unnecessary noise or jolting and without danger to their safety and comfort by reason thereof; nor unless there shall be furnished a sufficient number of cars, on each separate line, to carry passengers comfortably and without overcrowding, and which cars shall be run upon a proper and reasonable time schedule, a copy of which shall, upon request, be furnished to the commissioner of public works; nor unless each car, on each separate line, except in case of a blockade or other unavoidable interruption of traffic, when it once starts on its trip, shall be run to such terminus of said line as is designated on said car without switching back before reaching said terminus, if there are any passengers on said car who desire to be carried to such terminus." (Here follows provisions excepting grip cars from the provision as to temperature, and other things not material in this case.)

"1959. (Penalty.) Any person, firm, company or corporation who shall be guilty of violating any of the provisions of the preceding section shall be fined not less than \$25 nor more than \$100 for each car operated in violation of this law, and each day of the operation of such car shall be considered a separate offense."

The Chicago City Railway Company and the receivers of the Chicago Union Traction Company, appellees, filed their bill in this case in the circuit court of Cook county praying the court to enjoin appellant from enforcing said ordinance so far as it is designed to compel them to furnish a sufficient number of cars to carry passengers comfortably and without overcrowding, from prosecuting suits against them to enforce the payment of any penalty for any alleged violation of the provision in question, and from bringing any further suits or taking any steps or proceeding whatsoever thereunder. The amended bill alleges that the provision requiring the appellees to furnish a sufficient number of cars to carry passengers comfortably and without overcrowding is void on three grounds, which are stated by their counsel in their brief and argument, as follows: "(1) That it is in violation of paragraphs 96, art. 5, Cities and Villages Act (Hurd's Rev. St. 1905, c. 24 § 62), which provides that no fine or penalty shall exceed \$200 for a single offense,' and also section 11 of article 2 of the Constitution, which, provides that 'penalties shall be proportioned to the nature of the offense.' (2) That it is uncertain, in that it does not sufficiently define the offense for which its multiplied penalties are imposed, and is for that reason void. (3) That it is unreasonable, and therefore void." The circuit court overruled appellant's demurrer to the bill as amended, and, appellant having elected to stand by the demurrer, the court entered a final decree finding that said provision of the ordinance is void, and enjoining appellant from enforcing or attempting to enforce the same, and from further prosecuting suits brought against the appellees.

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The material facts alleged in the amended bill and admitted by the demurrer are: That before, and at the time of, the passage of the ordinance the Chicago City Railway Company, one of the complainants, maintained and operated 220 miles of street railway on the streets in the south division of the city of Chicago; that the receivers of the Chicago Union Traction Company, the other complainant, maintained and operated 303.93 miles of street railway on the streets in the north and west divisions of the city, with terminal connections in the south division; that the business center of the city is in the south division, in what is known as the "down-town loop"; that complainants are the only surface street railways serving the city of Chicago, except 12 other lines of surface street railway operating in outlying districts and not owning down-town terminals; that complainants furnish transportation for more than 2,000,000 people, and for almost all the population of the city; that it is, and has been, the custom to permit passengers to stand in the aisles and on the platforms, and all street cars are provided with straps and other devices to accommodate standing passengers; that complainants have made efforts to procure additional cars, but they can only be obtained by placing orders with street car builders and manufacturers from three to four months before the order can be filled; that during the rush hours of the day it is impossible to prevent congestion of travel in the business center; that congestion and disturbances are caused by various conditions set out in the bill; and that the ordinance is unreasonable, and therefore void as applied to complainants, because it is impossible for them to comply with it. The bill alleges that 60 suits have been brought against the Chicago City Railway Company by the defendant before a justice of the peace; that 100 like suits have been brought against the receivers; that a suit in debt has been brought against each complainant in the circuit court, and in each suit the declaration contains 25 counts for violations of the ordinance; and that the city intends to bring numerous other suits for like violations.

The efforts of counsel for appellees, in their brief and argument, are directed to giving such an interpretation to the ordinance as to render it void. They contend that it imposes a penalty of not less than \$25 nor more than \$100 daily for each one of the thousands of cars operated by them, respectively, in case one car is overcrowded, and therefore the penalty exceeds \$200 for one offense and is not proportioned to the nature of the offense; that there is such uncertainty in the meaning of the words "comfortably" and "overcrowding" that the ordinance is void on that account; and that under the facts alleged in the bill the provision in question is unreasonable, and therefore void. The ground upon which they say that a court of equity ought to intervene and prevent enforcement of the ordinance is that these two complainants are members of a class, and that a multiplicity of suits will thereby be prevented. Counsel for appellant deny that the provision of the ordinance in question is void for any of

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the reasons assigned. They contend that the provision is a valid exercise of the police power; that it was enacted in the interest of the public health, safety, and welfare; that the prosecutions under it are of a criminal or quasi criminal nature; and that equity has no jurisdiction to enjoin the prosecution of suits of that nature.

It is settled beyond controversy that a court of equity has no jurisdiction to interfere with prosecutions for criminal offenses, and it makes no difference whether the prosecution is under a statute which applies to the state at large or under an ordinance which is in force only in a particular municipality. Courts of equity deal only with civil and property rights, and their powers do not extend to determining what laws or ordinances are valid or invalid unless such determination is incidental to the protection of rights recognized by courts of equity alone. *High on Injunctions*, § 68, p. 1244. In the case of *Stuart v. La Salle County*, 83 Ill. 341, 25 Am. Rep. 397, the court said that, from the nature and organization of a court of equity, it has no jurisdiction to stay or prevent the execution of a judgment in a criminal case; and in *Cope v. District Fair Association of Flora*, 99 Ill. 489, 39 Am. Rep. 30, where a bill was filed against an incorporated fair association to restrain it from permitting gambling on its grounds, the court said that it is no part of the mission of equity to administer the criminal law of the state, except so far as it may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance. The same doctrine was applied in the case of an ordinance in *Yates v. Village of Batavia*, 79 Ill. 500, where suits had been commenced against each of the complainants for violating the provisions of an ordinance to provide against the evils resulting from the sale or giving away of intoxicating liquors, and a bill was filed to prevent the further prosecution of the suits and settle the legality of the ordinance. It was held that a court of equity has no jurisdiction of the subject-matter of such litigation, and that it is not in the power of parties to waive the questions relating to the jurisdiction. In *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. E. 88, a bill was filed to enjoin a repetition of actual trespasses under an ordinance prohibiting gambling, and it was said that, as a general rule, equity will not enjoin the exercise of police power given by law to the officers of a municipal corporation, nor interfere with the public duties of any of the departments of government, nor restrain proceedings in a criminal matter. That case also involved property rights and injury to business, and it was held that relief was properly denied on the further ground that there was an adequate remedy at law.

Power is given to cities and villages to prevent, suppress, prohibit, and punish various offenses against the public in the nature of misdemeanors not directly involving civil or property rights; and a court of equity has no jurisdiction to interfere with pros-

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ecutions for such offenses on account of the number of persons charged or upon any other ground, and, in any case, the fact that an ordinance is void, or that a party seeking an injunction has not violated its provisions, affords no ground for interference. 11 Am. & Eng. Ency. of Law (2d Ed.) 198; 16 Am. & Eng. Ency. of Law (2d Ed.) 371. Cities and villages also exercise powers relating to local affairs, such as licensing and regulating certain occupations, and the ordinance in this case is within the power conferred upon the defendant by clause 42, § 1, art. 5. Cities and Villages Act (Hurd's Rev. St. 1905, c. 24, § 62), giving cities power to regulate the occupation of complainants. *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 461. The provision is also within the police power, but it is of a nature to directly affect the business of the defendants. In such a case rights are involved which may authorize interference by a court of equity, although the mere invalidity of the ordinance affords no ground for such interference. If the court where a prosecution has been commenced cannot adequately protect the rights of the defendant, and the controversy includes some equitable feature which can only be fully and finally determined by a court having equitable jurisdiction, such a court may interfere and decide the controversy. A court of equity will not stay the enforcement of an ordinance upon any legal grounds, but the defendant must have some equitable right which can only be recognized by that court. Litigation commenced in a court of competent jurisdiction should be allowed to proceed to a final conclusion in that court, and for a court of equity to take jurisdiction to decide a suit upon a ground equally available in a court of law would be obvious error. That is especially true of cases like this, as was pointed out in *Poyer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. The court there said that nothing could be more detrimental to society and provocative of violations of law than for courts of equity to interfere by injunction, and thereby protect repeated acts in violation of ordinances; that, while the injunction continued, the functions of municipal government would be suspended and irreparable injury might thereby ensue. One forcible reason pointed out for noninterference was that, if it should at last be determined that the ordinance was valid, the court would be powerless to enforce its provisions or enforce the penalties denounced against its violation, but must remit the case to the court of law. All that the court could do would be to prevent, for a time, the exercise of the functions of government.

The ordinance in this case is within the powers conferred upon the defendant, and it has for its object the laudable purpose of protecting the traveling public against discomfort, annoyance, and danger. It is designed to promote the public comfort, safety, and health by preventing the overcrowding of cars, and it should be sustained if it is legally possible to do so. To grant an injunction and prevent the prosecution of offenses against the

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ordinance during the progress of a chancery cause would be to render the municipal authorities helpless in the discharge of their public duties and suspend their legitimate functions, contrary to public policy and public interest. At the end of such a suit the court would have no right to determine whether the complainants have been guilty of any infractions of the ordinance or to impose any penalty upon them. If the city should be found to be in the right and the ordinance valid, all that the court could do would be to dismiss the bill and send the parties back to a court of law. In such a case a court of equity would not be warranted in interfering unless it is clearly necessary to the protection of some right recognized only by courts of equitable jurisdiction. The provision of the ordinance involved in the case of *Poyer v. Villages of Des Plaines*, *supra*, declaring public picnics and open-air dancing to be nuisances, was void, and was so held by the court of law (*Village of Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524), but it was held that equity would not interfere to restrain prosecutions under it. The reasons set up for asking a court of equity to interfere was that seven suits had been begun for violations of the ordinance, and that the ordinance was void, but those facts were not regarded as any justification for an appeal to equity. The court quoted from the decision in *West v. Mayor*, 10 Paige (N. Y.) 539, to the effect that the question of the validity of an ordinance does not properly belong to a court of equity where the complainants have a perfect defense at law if the ordinance is invalid, and that it would be a usurpation of power for such a court to draw to itself the settlement of such questions when their decision is not necessary in the discharge of the legitimate duties of the court. It must appear, not only that the acts complained of are unauthorized and injurious, but that they are of such a character that proceedings at law will not afford adequate and full relief. *Gartside v. City of East St. Louis*, 43 Ill. 47.

In the bill in this case no facts are stated which would constitute an irreparable injury to complainants. Many suits have been instituted, but the imposition of many penalties for many violations of an ordinance does not amount to irreparable injury. An offender cannot, by multiplying his offense, invoke the aid of a court of equity. *Moses v. Mayor of Mobile*, 52 Ala. 198. If a court could take jurisdiction of a bill to declare an ordinance void because of the numerous prosecutions under it, a complainant would be able to confer jurisdiction by repeating his offense, and of course that could not be so. The fact that a great many suits had been brought against a single party was regarded as a sufficient cause for enjoining the prosecution of all the suits but one in the case of *Third Avenue Railroad Co. v. Mayor of New York*, 54 N. Y. 159. The city had brought 77 suits in a justice's court to recover penalties for violating city ordinances concerning the running of cars without a license. The railroad company brought its suit to secure an injunction against all of the suits

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except one, and offered to abide the final decision of that one. The relief was granted upon the ground that a justice's court had no power to consolidate the actions. But this court held a different doctrine in the case of *Chicago, Burlington & Quincy Railroad Co. v. City of Ottawa*, 148 Ill. 397, 36 N. E. 85. In that case there were prosecutions before a justice of the peace for violations of an ordinance, and appeals were taken from judgments rendered. Ten other suits were begun, returnable on successive days. Sundays excepted, and the prayer of the bill was that the defendant be restrained from prosecuting under the ordinance, and for a temporary writ restraining the city from prosecuting any other suits except the two then pending on appeal in the circuit court. The court held that every question arising in the suits could be settled and determined on the trial of a case in the circuit court, which was entirely competent to decide whether the ordinance was valid or not, and that the circuit court was right in refusing to enjoin the prosecution of any of the suits. In this case all the questions can be finally settled in an action of debt in the circuit court, or upon appeal from a justice's judgment. Even if the controversy would not be finally settled in one suit against each complainant, this bill could not be maintained on the ground that it is a bill of peace to put an end to unnecessary and vexatious litigation. In such a case the rights of the parties must be finally adjudicated in a court of law. In cases where one judgment is not conclusive in a subsequent suit, equity will sometimes interfere to prevent litigation which has become useless and unavailing, but the question must first be determined in at least one action at law. The court will never entertain a bill of peace so long as the right of the complainant is uncertain.

There are cases in which a court of equity will interfere to enjoin the enforcement of an ordinance for the reason that a multiplicity of suits will be prevented thereby, and it is argued that this is such a case. The bill is filed by two complainants, who say that they also ask relief for all others similarly situated. The facts stated, however, do not show that any other persons or corporations are similarly situated. It appears from the bill that the complainants serve practically the whole city of Chicago; that the population served by them is upwards of 2,000,000; and that with the exception of 12 other lines operating in outlying districts and not owning down-town terminals, they are the only persons or corporations furnishing street railway transportation. It does not appear that the few other persons or corporations operating in outlying and sparsely settled districts do not furnish a sufficient number of cars, or that there is any necessity in such districts for overcrowding, or that overcrowding cars is permitted, or that any prosecution has been begun or threatened against any other person or corporation, or that any other person or corporation has suffered, or will suffer, any hardship, or make any complaint whatever of the ordinance or

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its provisions. The case is not at all like one where a license is required for carrying on an occupation or business, where the inference is that those engaged in the occupation or business will be required to procure the license and pay the fee therefor. The bill sets up conditions respecting these complainants and their business which could have no application to any other party, and it is clear that the controversy is between the two complainants and the defendant. There is nothing in the bill to justify the assertion that they represent a class, and the bill shows that the supposed class is not numerous.

Under the rule that equity will sometimes intervene to prevent a multiplicity of suits, it was held in *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224, that 373 complainants suing in behalf of themselves and between 200,000 and 300,000 others similarly situated, could maintain a bill to enjoin the enforcement of an ordinance requiring an annual license fee. That was a case where a license was required, and a fee exacted, from the complainants and all others who made use of means of travel in the city of Chicago. They were all similarly situated. The case of *Wilkie v. City of Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182, was a similar one. In that case 78 complainants filed a bill in behalf of themselves and 900 or more others from whom the city of Chicago exacted a license fee for pursuing their occupation. Another case where it was held that a court of equity might properly interfere was *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718, where complainants, on behalf of themselves and 3,000 or 4,000 other persons engaged in the same business as themselves, joined in a bill to prevent the enforcement of an ordinance licensing and regulating that business. In all of those cases there was actual application of the ordinance to numerous persons, all of whom were in like situations. In the case of *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410, 61 N. E. 94, 42 corporations, who were complainants, filed a bill to enjoin the defendant from paying over to the State Treasurer moneys collected from them as a tax. It would have required at least 42 suits to accomplish the purpose of the bill, and the facts and law in each case would have been exactly the same. It was held that the case was a proper one for the exercise of equitable powers. In the case of *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423, a bill was filed by the insurance superintendent against 20 companies and 33 individuals to enjoin them from transacting the business of fire insurance without complying with the law. It was held that in such a case equity might interfere. Plainly, there is no similarity between those cases and this case in which two complainants, operating in different parts of the city and furnishing practically all the street railway service for the city of Chicago, claim the right to maintain a suit in equity to settle the question of the validity of this ordinance for the reason that there are other persons and corporations operat-

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ing lines of street railway in outlying districts, where perhaps the difficulty is not so much to prevent overcrowding cars as to fill them with passengers. So far as appears from the bill, the only real dispute is between the two complainants and the defendant, and the rights and interests of numerous parties are not involved.

The decree of the circuit court is reversed, and the bill dismissed.

Bill dismissed.

COX v. PHILADELPHIA, H. & P. R. Co.

(Supreme Court of Pennsylvania, May 24, 1906.)

[64 Atl. Rep. 729.]

Eminent Domain—Measure of Damages.*—Where part of a tract of land is taken or injured by a railroad company, the measure of damages is the difference in the market value of the tract as a whole before the taking and afterwards.

Same—Elements of Damage.*—In determining the damages in condemnation proceedings, the landowner is entitled to have the jury consider the value of his property for any use to which it may be adapted, and have the damages assessed on the most valuable use.

Same—Benefits to Land Not Taken.†—In assessing damages in condemnation proceedings the railroad company is entitled to any benefits which may accrue to the land not taken or injured by reason of the improvement.

Same—Elements of Damage.‡—A landowner may show that the land taken is specially valuable for the raising of ducks, but cannot show how many ducks he raised or could raise in a year, nor base the estimate of damages on the profits which the witnesses thought the owner would derive from such business.

Same—Unlawful Use of Land.—In condemnation of land used by landowner for raising ducks, the railroad company cannot show that

*For the authorities in this series on the subject of the measure and elements of damages recoverable in condemnation proceedings, see foot-notes appended to *St. Louis Belt & Ter. Ry. Co. v. Mendonsa* (Mo.), 19 R. R. R. 618, 42 Am. & Eng. R. Cas., N. S., 618; *Norfolk & W. Ry. Co. v. Davis* (W. Va.), 19 R. R. R. 593, 42 Am. & Eng. R. Cas., N. S., 593.

†For the authorities in this series on the question, what constitutes benefits to the property owner from the construction or operation of a railroad on or near his property, see foot-notes appended to *Illinois, etc., R. Co. v. Borms* (Ill.), 18 R. R. R. 823, 41 Am. & Eng. R. Cas., N. S., 823.

‡For the authorities in this series on the question whether the special value of property to its owner, arising from the particular use to which it is devoted, is to be allowed as a measure of compensation for its condemnation, see foot-notes appended to *Sanitary Dist. v. Pittsburgh, etc., Ry. Co.* (Ill.), 20 R. R. R. 145, 43 Am. & Eng. R. Cas., N. S., 145.

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such use would pollute a stream passing through it to the injury of lower riparian owners, as that question would be between such owners and the owner of the land condemned.

Same—Incorrect Map.—In condemnation proceedings, a map shown to be an incorrect representation of the ground, and made by one who had no data from which he could make an accurate map, was properly excluded.

Appeal from Court of Common Pleas, Cumberland County.

Action by R. G. Cox against the Philadelphia, Harrisburg & Pittsburg Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John W. Wetzel, of *Wetzel & Hambleton*, for appellant.

F. E. Beltzhoover and *S. B. Sadler*, for appellee.

MESTREZAT, J. This was a proceeding in the court below to assess the damages sustained by the plaintiff by reason of the defendant company's appropriation of a strip of his land for widening its right of way. The viewers having reported in favor of the plaintiff, the defendant appealed to the common pleas, in which an issue was framed, and the case was tried before a jury, resulting in a verdict and judgment for the plaintiff. The defendant has appealed to this court.

It is well settled that the measure of damages for land taken or injured by a railroad company under the right of eminent domain is the difference in the market value of the tract as a whole before the taking and afterwards, as affected by it. In adjusting this difference, the landowner is entitled to have the jury take into consideration the value of his property for any and every purpose or use to which it may be adapted, and to have the damages assessed upon a basis of the most valuable use to which the property may be adapted. As said by the present Chief Justice in *Harris v. Railroad Company*, 141 Pa. 242, 21 Atl. 590, 23 Am. St. Rep. 278: "In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinion of experts." On the other hand, the defendant company is entitled to any benefits or advantages which may accrue to the part of the tract of land, not taken or injured, by reason of the construction of the improvement. In ascertaining the damages, therefore, the jury must take into consideration the value of the land for the uses to which it has been or may be applied, and the special advantage the construction of the road may be to the residue of the tract through which it is constructed. While these general principles, applicable to the assessment of damages in condemnation proceedings, are well settled, there is another rule which has been recognized and enforced for more than three-quarters of a century in this state, which prohibits the landowner from having the profits of his

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business considered by the jury in determining the value of the property which is affected or injured by the improvement. "We have so often said," says Mr. Justice Green in *Becker v. Philadelphia & Reading R. R. Co.*, 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583, "that the profits of business could not be recovered in condemnation proceedings that it seems like a waste of time to cite the decisions. As far back as *Thoburn's Case*, 7 Serg. & R. 411, it was held that, in estimating the damages done to the landowner, the jury are to value the injury to the property at the time the injury was suffered, without reference to the person of the owner or the state of his business. The allowance of damages for an actual or supposed loss of profits in a business carried on upon the premises by reason of the taking, was most emphatically condemned in the opinion, and that decision has been followed by this court from that day to this. * * * After stating the injustice of allowing for the profits of business to be carried on, the Chief Justice added in *Thoburn's Case*, 'that would make the defendant an insurer of ordinary profits in a new state of the business, pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual to be compensated are ascertained.'" *Pittsburg & Western Railroad Co. v. Patterson*, 107 Pa. 461, originated in a proceeding for the assessment of damages occasioned by reason of the location of the defendant's road through the plaintiff's land. In delivering the opinion in that case, Mr. Justice Clark said (page 464): "The use to which the property has been or may be applied is proper for the consideration of the jury, in the estimate of its value, its adaptation for any particular purpose may enhance its market value, but the court was certainly correct in saying that the jury could not take into consideration any supposed loss to the plaintiff, of profits in his business. Such an assessment would be purely speculative, and the rule which justified it would lead to most ruinous results. If the property, by reason of its location or otherwise is especially adapted to any particular use to which it is applied, if it is worth more for that particular use than for any other, its market value will be measured accordingly."

In the case at bar it was proper for the plaintiff to call witnesses to show the uses or purposes for which his land was specially adapted, including that of duck raising. The landowner, in condemnation proceedings, is not limited to any one use for which his property may be available, but he is entitled to have its value considered for any and all purposes for which it can be used. He may, therefore, show by any competent testimony, expert or otherwise, that it is especially valuable for a certain particular purpose, and that purpose must enter into its value before the jury. So, here, it was proper for the plain-

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tiff to show by competent expert testimony the value of his property for duck-breeding purposes, and the jury was required, in passing upon the case, to take into consideration its value for that purpose. But in every case of this character the parties to establish their contention are required to produce competent testimony, and the question of competency was one for the court to determine. The plaintiff called at least four witnesses as experts to show the value of his farm for duck-raising purposes. Conceding that they disclosed sufficient knowledge of the business to make them competent to testify as to the adaptability of the property for a duck farm, their testimony clearly showed that their valuation of the property for such purpose rested upon an erroneous basis, the profits which the plaintiff would realize out of the business conducted upon the land. Mr. Stouffer fixed the plaintiff's damages, by reason of the construction of the road through the premises, at \$8,000. Of this sum he allowed \$6,000 as the value of a pen on the premises destroyed by the defendant company. In testifying as to this item of depreciation, he said: "That will depreciate the capacity about 2,000 ducks a year, our books will show 20 per cent. apiece profit on a duck; that will be \$400 a year. I arrived at that conclusion in this way, that is not taken for one year, it is taken for all time. * * * If we were in business for 20 years (and there is no reason why we should not be) that would be \$8,000 loss, without any interest." Mr. Cox, the plaintiff, fixed the damages at about \$10,000. He said the land was worth \$1,500 as land and that the encroachment of the railroad on the part of the land used as a duck farm had reduced its capacity or output to the extent of a capitalization of \$8,000. He testified: "Q. How much of the \$8,000 do you estimate as loss to the farm as a duck farm? A. It reduces their output to that extent. Q. How much? A. About \$500 or \$600 a year. It reduced the breeding pens so that the eggs laid and the ducks produced are less by at least 2,000 per year, 2,000 marketable ducks. Q. And you calculate so much profit on each duck? A. Yes. Q. What profit do you count on that? A. The duck people usually get 20 cents per duck. Q. Is that the way you estimate the \$8,000 by estimating the profits? A. Yes." Mr. Morgan, another witness, estimated the plaintiff's damages at from \$8,000 to \$10,000. He thought the space cut off on the water front would be 60 feet, and based his estimate of the damages on that fact. He testified: "Well that (60 feet) will accommodate even breeding ducks, which would produce 6,000 ducks; I figure 15 cents profit, that represents a loss of \$900 a year." George Woods, called by the plaintiff, fixed the damages at \$8,000. His manner in arriving at this sum as damages is stated in his testimony as follows: "You could handle about 200 breeders there, which would produce eggs enough from which you could probably market 6,000 ducks, at, say, from 15 to 20 cents apiece profit, or it could be used as a fattening pen for fattening ducks. I think 2,000 can be handled in that building

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in a season, in a year, and from those 2,000, judging from the market profits, \$400 should be derived." William Nicholson, another witness, places the damages at from \$8,000 to \$10,000. His estimate was based upon the fact that the defendant company destroyed the best duck pen on the premises, in which 2,000 ducks could be raised for the market in a season and that would decrease the capacity of the farm to that extent. His estimate was fixed by allowing 20 cents profit on each duck raised.

At the close of the case, the defendant's counsel moved to strike out that part of the testimony of the above witnesses relating to the value placed by them on the injury done to the plaintiff's property, but the motion was denied. The testimony discloses the fact that the witnesses arrived at their conclusion as to the damages sustained by the plaintiff on an erroneous basis. Their estimates were made upon the profits which they thought the plaintiff would derive from the duck-raising business. Such basis was entirely too uncertain and speculative to permit it to enter into any calculation or estimate of the damages which the plaintiff sustained by reason of the construction of the defendant's road through his premises. In speaking of the manner of estimating the value of land in eminent domain cases by considering the profits realized therefrom, Mr. Justice Williams in *Reading & Pottsville Railroad Co. v. Balthaser*, 126 Pa. 1, 10, 17 Atl. 518, 519, said: "We held (on a former appeal of the same case) that such a method for fixing the value of the land was speculative, and could not be applied to land taken by virtue of the right of eminent domain. It involves an uncertain estimate of the quantity and quality of the stone, includes necessarily the use of labor and capital, requires skill and intelligent supervision on the part of the operator, and vigilance and success in the financial management. No human mind can foresee the presence of these elements of business success, or forecast the profit or loss of actual operations, if the stone be removed at the ordinary rate of quarrying." We are clearly of opinion that the defendant's motion should have been allowed and that the estimates of the witnesses as to the value of the plaintiff's land and the damages suffered by the construction of the road through it should have been struck from the record.

The court did not err in excluding the map offered in evidence by the defendant company. It was not shown to be a correct representation of the ground taken nor of the buildings affected; on the other hand, it appeared by the testimony of the party who made it that he did not have the data from which he could make an accurate map. In the trial of cases of this character, there should be a map of the locus in quo, as it aids most materially the court as well as the jury in the consideration of the case. From the evidence before us, it is difficult to determine the location of the spring or the buildings or the course of the stream with reference to the strip of land condemned. The offer by the defendant to show that the use of the plaintiff's land as a duck

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farm would pollute the stream passing through it and thereby prevent the use of the land for that purpose, was properly rejected as raising a collateral issue which could not be determined in this case. Whether the lower riparian owners would object to such use of the land was uncertain and purely speculative; and if they did, non constat that the objection could not, at small expense, be removed. At all events, the defendant company is not in a position to assert the rights of the lower riparian owners who alone have an action against the plaintiff here for any injury which they may sustain by an interference with the purity or flow of the stream.

The eighth assignment must be sustained notwithstanding the attempt to cure the error in the general charge. The plaintiff had the right, as we have held, to show that his farm was adapted to the use of and was valuable for duck-raising, but he could not show the average number of ducks he raised on the farm each year. While in one sense such testimony would show the productive capacity of the farm per year, it would also afford the jury an opportunity to estimate the profits of the land. The plaintiff could show by competent testimony the acreage of his land and also its adaptability for the duck business by reason of its location, water, etc., which the jury was required to consider as an element of value; but when he was permitted to show that he produced from 45,000 to 50,000 ducks per year it furnished the jury the data from which it could and doubtless did ascertain the profits of the business which it used as a basis in determining the market value of the plaintiff's property. The number of ducks the plaintiff may produce on the land in the future depends upon so many contingencies that any estimate thereof would be purely speculative and should not go to the jury even as evidence of the productive capacity of the farm.

The assignments of error are sustained so far as the matters complained of therein are in conflict with the views above expressed, and the judgment is reversed with a venire facias de novo.

BROWN *et al.* v. ATLANTIC & B. RY. CO.

(Supreme Court of Georgia, Aug. 13, 1906.)

[55 S. E. Rep. 24.]

Railroads—Change of Location.*—Where a railroad company to which has been given the power to choose its particular route between designated termini has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority.

Same—Relocation of Line.—The Civil Code of 1895, § 2171, does not authorize a railroad company which obtained its charter from the Secretary of State under the general law for the incorporation of railroads after having located, constructed, and put in operation its road, at its mere volition to tear up such road, or a section thereof 19 miles in length, and relocate the same at a different place; nor is such authority conferred, although the portion of the road sought to be taken up and relocated lies outside of the limits of a town or city.

(a) The defendant appears to be the successor to the road and franchise of the original company locating and constructing such road; and is so dealt with in this decision.

Injunction—Relocation of Railroad—Tearing Up Track.—Where a railroad company owned two lines which crossed or separated from each other at an acute angle, a general allegation in an answer to an application for injunction to prevent the tearing up of part of one of them, to the effect that the defendant had leased another road which connected its two lines at a point on one of them some 19 miles from the point of union, and that it could thus operate its trains by this route and furnish as good service to the public, and did not need and could not profitably operate one of its lines between such point of union and the point where the leased line touched it (not showing the terms or length of the lease, nor even its existence, except by the general statement in the answer), did not furnish sufficient reason for allowing the intervening section to be torn up, and to prevent an injunction to stay such action until a final trial could be had at the instance of persons living and doing business along the line so to be

*For the authorities in this series on the subject of the powers of a railroad company in regard to the location of its route, see *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.* (W. Va.), 19 R. R. R. 412, 42 Am. & Eng. R. Cas., N. S., 412; *Central of Ga. Ry. Co. v. Union Springs, etc., Ry. Co.* (Ala.), 18 R. R. R. 820, 41 Am. & Eng. R. Cas., N. S., 820; *Collier v. Union Ry. Co.* (Tenn.), 17 R. R. R. 426, 40 Am. & Eng. R. Cas., N. S., 426; *Altoona Belt Line St. Ry. Co. v. City Pass. Ry. Co.* (Pa.), 13 R. R. R. 52, 36 Am. & Eng. R. Cas., N. S., 52 (no continuous route, within charter provision, where portion of it is on street which street railway company has no right to occupy); *Ohio River R. Co. v. Johnson* (W. Va.), 1 R. R. R. 533, 24 Am. & Eng. R. Cas., N. S., 533 (company not bound to locate tracks on center line of right of way); *Kansas, etc., Ry. Co. v. Northwestern Coal & Min. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 593 (statutory right to select location in exercising power of eminent domain).

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torn up, and having stations thereon where they made shipments, and who would be specially injured by such action.

Same.—The fact that the company had begun to tear up its track before the injunction was applied for to restrain the completion of such action, if wrongful and working special damage to the plaintiffs, will not furnish a reason for refusing to enjoin it from proceeding with the work.

Same—Relaying Track.—A mandatory injunction to require the relaying of a substantial portion of the track which had been torn up, and the operation of the road, was not sought at the interlocutory hearing in this case. If it were, to that extent it would be denied.

Same—Special Damages.—If wrongful action was about to be taken which would work special and irreparable damage to the plaintiffs, not merely such as would be shared in by the general public, they could apply for an injunction to restrain it.

Same—Discretion of Court.—The facts of this case, as disclosed by the pleadings and evidence in the record now before us, do not make such a case as to be controlled by the discretionary action of the presiding judge in granting or refusing the injunction.

Same—Remedy at Law.—In a case of the character indicated by the preceding notes, an injunction will not be denied on the ground that the plaintiffs have an ample remedy at law, or on the ground that the damages complained of are not irreparable.

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by J. L. Brown and others against the Atlantic & Birmingham Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Brown and others filed their petition against the Atlantic & Birmingham Railway Company, seeking to enjoin the defendant from tearing up, removing, or abandoning a section of one of its lines of road about 19 miles in length. They alleged that along the section which the defendant intended to tear up they lived, owned property, and did business; that the road ran through or near their lands; that there were several stations on this section of road, at one of which one of the plaintiffs had located at large expense a "general cross-tie business" and shipped the output of the business over this line of road, and had made investments for the purpose of also doing "a turpentine business;" that this was the only line running and operating through these places, that the other plaintiffs were the owners of large tracts of real estate along and contiguous to the line of road, and some of them owned and operated farms near it, and had upon the faith of the location and operation of the road made valuable improvements on their property; that the defendant was proceeding to tear up and abandon its road between Bushnell and Ocilla, which includes the section above referred to, and that to permit this to be done would work irreparable injury to the plaintiffs, and cause

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damage which, on account of the nature of the investment and the depreciation in value of business, would be incapable of being measured by the rules of law. The defendant admitted that it intended to take up its line between the towns of Bushnell and Ocilla, but it claimed that it had the right to do so. It denied that plaintiffs would be injured as claimed, or were entitled to any injunction. It alleged that it had two lines of road which separated from each other at the town of Bushnell at an acute angle; that from Bushnell to Ocilla was 19 miles; that it had leased another road which connected a point on the more northern line of its railroad, called Osierfield, with Ocilla, and that thus it had a line from Bushnell to Ocilla by way of Osierfield, and the distance from Bushnell to Osierfield is 11 miles, but it was alleged that the two lines were only about 3 miles apart, and the distance by that way not much longer than by the other; that the public could be as well or better accommodated by this line, and that on account of the maintenance, and the small amount of business done on the section of the direct road between Bushnell and Ocilla, it was not remunerative to operate trains by that route. It was further alleged that somewhat more than 4 miles of the track had been removed before the restraining order was obtained, and that the change in plan by the abandonment of the old road would not "make any greater distance than four miles for transportation of any freight to be delivered at other points in lieu of any point on the old road." It appeared that what was originally known as the "Waycross Air Line Railroad Company," having a line of road extending from Waycross to Fitzgerald, in Irwin county, and a further line under construction extending beyond that point to Cordele, changed its name to the "Atlantic & Birmingham Railroad Company," increased its capital stock, and obtained an amendment to its charter authorizing it to extend the road to the Alabama line in the direction of Birmingham, to build a branch in the direction of Atlanta, and obtain the benefits of the general laws on the subject of railroads incorporated by the Secretary of State. This is now held by the defendant. The Brunswick & Birmingham Railroad Company was chartered for the purpose of building and operating a railroad from Brunswick through various counties, including that of Irwin, to a point on the Alabama line; the purpose being to continue the road to the cities of Montgomery and Birmingham, in that state. The defendant became the purchaser of that road, which according to the evidence extended from Brunswick to Nichols, where it joined the defendant's railroad, and then from a point westward of this junction, namely, Bushnell, extended westward through Ocilla a distance of some miles to Irwinville. The details of the manner of the purchase do not appear. On the hearing the presiding judge refused the injunction and plaintiffs excepted. The other facts, so far as necessary to be stated, are set out in the opinion.

Brown v. Atlantic & B. Ry. Co*C. T. Roan and F. Wills Dart*, for plaintiffs in error.*King, Spalding & Little and Haywood & Cutts*, for defendant in error.

LUMPKIN, J. 1. Has a railroad company authority, after it has located and constructed its line, to abandon it, or a portion of it some 19 miles in length, tear up its track, and relocate such part of its line over a different route? "It is generally held that where a railroad company to which has been given the power to choose its particular route between designated termini has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. Thus a change cannot be made for reasons of convenience, or expediency, or economy merely." 23 Am. & Eng. Enc. L. (2d Ed.) 690 (5); *Leverett v. Middle Ga. & A. R. R. Co.*, 96 Ga. 392, 24 S. E. 154 (in that case the terminus was fixed by the charter; but the reasoning of it is applicable to several of the questions in the case now before us); *State ex rel. Little v. Dodge City, etc., R. Co.*, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564, and notes; *Lusby v. Kan. City, M. & B. R. R. Co.*, 73 Miss. 360, 19 South. 239, 36 L. R. A. 510; *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co.*, 149 Ill. 272, 37 N. E. 91; *Ill. C. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; *People v. L. & N. R. Co.*, 120 Ill. 48, 65, 10 N. E. 657; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78; *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316; *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. Law, 205; *Mason v. Brooklyn, etc., R. Co.*, 35 Barb. (N. Y.) 373; *People v. New York & H. R. R. Co.*, 45 Barb. (N. Y.) 73; *Morehead v. Little Miami R. Co.*, 17 Ohio, 340; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235, 59 Am. Dec. 667; *Negus v. Brooklyn*, 10 Abb. N. C. (N. Y.) 180; *In re Providence*, 17 R. I. 324, 21 Atl. 965; *Boston & P. R. R. Corp. v. Midland R. Co.*, 1 Gray (Mass.) 340. The authorities differ somewhat as to what will constitute a location within the rule; but after the selection of the route and actual construction they generally concur that the location is fixed. *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 437; 4 Am. & Eng. Ry. Cas. 199, 200, note to *Western Penn. R. Co.'s Appeal*; and cases cited above. Most of the cases cited by defendant in error, when carefully considered, do not militate against this position. Several of them are applications for mandamus to compel the company to perform certain alleged duties of a public character. Thus in *Crane v. Chicago, etc., R. Co.* (Iowa) 37 N. W. 397, 7 Am. St. Rep. 484 (an application for mandamus), the plaintiffs and others were shown not to have been deprived of railroad facilities, and there had been public meetings and an agreement with citizens as to the matter. In *Snook v. Ga. Imp. Co.*, 83 Ga. 61, 9 S. E. 1104, it was held that a change in the terminus of a railroad was such a material change as operated to release a subscriber for stock who did not

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consent thereto. In *Northern Pac. R. Co. v. Dustin*, 142 U. S. 499, 12 Sup. Ct. 283, 35 L. Ed. 1092, an effort was made to compel a railroad company by mandamus to locate and erect a station at a certain place, although one had been located about four miles distant. There was evidence to show that the depot actually located best served the interests of the public in that vicinity. A dissenting opinion was filed by Mr. Justice Brewer, with whom Mr. Justice Field and Mr. Justice Harlan concurred. In the course of it is used the following vigorous language: "A railroad company has a public duty to perform, as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other." In *Mobile & O. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556, 560, an effort was made to compel a railroad company to maintain a station, although it had erected another about half a mile away, and it appeared that the public would be better served by the change. In the present case it is not a question of merely shifting the location of a station a short distance, but of abandoning altogether a part of a line, with the stations thereon, leaving no facilities there at all, and using another line located at a distance from the former location, at the widest point amounting to some three miles.

2. If, after location and construction of the road, statutory authority was required, was it conferred? Section 2171 of the Civil Code of 1895 is relied on as doing so. It reads as follows: "Said railroad company shall have the power to change the general direction and route of said railroad from that stated in the original petition, by a two-thirds vote of the capital stock of said corporation represented in person or by written proxy at any annual or special meeting of the stockholders of said corporation, and when the same is so changed, shall have the right and power to enter upon, condemn rights of way, and construct said road on the new or changed line as they had on the original line; but no change shall be made in any town or city after the road has been constructed, without the consent of such town or city expressed through its proper authorities, and in case the route is changed after grading is commenced, compensation shall be made to all persons owning lands on the original route which have been injured by such grading or other work on such original route. If no agreement can be made, such amounts are to be ascertained in the method provided for condemning right of way." Plaintiff in error contends that this does not confer power, after location and construction, to abandon, tear up, and change the location of the road; but that such power of change exists only before final construction. Defendant in error contends that such power exists equally after construction and operation as before. This section is taken from the act of 1892 (Laws 1892, p. 37), which was the general act touching the incorporation of railroads. "Statutes authorizing changes in the location of railroads are to be strictly construed." 23 Am. & Eng. Enc. L. (2d Ed.) 682 (b).

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See, also, on the general subject, Mayor, etc., of Macon v. Macon, etc., R. Co., 7 Ga. 221; Central R. Co. v. Collins, 40 Ga. 582, 625, 637, 638; Frederick v. City Council of Augusta, 5 Ga. 561; Mayor, etc., Savannah v. Hartridge, 8 Ga. 23; McLeod v. Burroughs, 9 Ga. 213; Winter v. Muscogee R. Co., 11 Ga. 438. This section of the original act (Laws 1892, p. 48, § 12) authorizes the company "to change *the general direction and route* of said railroad *from that stated in the original petition* * * * and when *the same* is so changed, shall have the right and power to enter upon, condemn rights of way and *construct said road* on the new or changed line as they had on the original line as set out in sections 9 and 10 of this act." The italics are ours. It had been provided that a petition should be filed with the Secretary of State setting forth certain facts, among which were "the length of the road as nearly as can be estimated, the general direction of said road, the counties through which it will probably run, the names of the principal places from which and to which it is to be constructed." Section 9 declared the powers of the company so incorporated and provided for such examinations and surveys to be made as should be necessary for the selection of the most advantageous route; for the acquisition of property by voluntary grants or purchase; for the laying out of its right of way, not exceeding in width 200 feet, and to construct the road; for the construction across or along streams, streets, or highways; for the crossing or joining other railroads; for the operation of the road as a common carrier; for the erection of buildings, fixtures, etc.; for the regulation and fixing of transportation rates, subject to the state law and the rules and regulations of the railroad commissioners; for the power to borrow money; for the acquisition of other railroads under foreclosure or judicial sale, and the power to reorganize. Section 10 authorized the extending of the railroad or the building of branches, but required that it be done by resolution of the board of directors designating the route of the proposed extension or branch, and after advertising and filing a copy of the resolution with the Secretary of State in a manner similar to that required in regard to the original petition. An examination of sections 9 and 10 indicates that the Legislature had in mind the making of provisions for the construction and operation of a railroad, not for its reconstruction or removal. Section 12 (Civ. Code 1895, § 2171) authorizes the company to change "the general direction and route of said railroad from that stated in the original petition." The language here used is applicable to the changing of the general direction and route, not the railroad after it has been constructed and operated. The original petition was required to contain a statement of the general direction and route of the railroad which it was intended to construct. Reasons might exist which would render such route impracticable, and it was the purpose of the Legislature not to restrict the company in constructing its road to an exact compliance with the petition in this regard, provided

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it should be altered by a two-thirds vote of the capital stock at an annual or special meeting of the stockholders. The change authorized was not from the road as constructed and operated, but from the general direction and route of the contemplated road stated in the original petition. It was also provided that when "the same [the general direction and route] is so changed the company shall have the right to enter upon, condemn rights of way and construct said road." These words more properly apply to an original construction than to a tearing up and reconstruction at a different place. The power to construct the road on the changed line is the same as that set out in sections 9 and 10. Section 9, as has been seen above, has reference to locating and building originally. Section 10, which authorized an extension of the road or the building of branches, requires certain proceedings to be had as a condition precedent to the exercise of the right, including advertising and filing a copy of the resolution with the Secretary of State. Is it within the range of probability that the Legislature intended that, if a railroad company should desire to make a short extension beyond the terminus originally contemplated, or to build a small branch road, it should be required to give notice by advertisement and filing resolutions with the Secretary of State, but that, without any formality whatever, after it had constructed and been actually operating its line, it could tear up the whole or part of such line at its pleasure, and relocate it at some entirely different place? Another expression in the section of the Code above quoted which strengthens this construction is the statement that "in case the route is changed after grading has commenced, compensation shall be made to all persons owning lands on the original route which have been injured by such grading or other work on such original route." The expression "after grading has commenced" evidently contemplates a change before the construction is completed. Certainly the Legislature did not intend to declare that after the building and construction the road might be torn up and removed without any provision being made for compensation, but that if this were done after grading was commenced, but before the completion, compensation should be made. It is contended by counsel for the defendant in error that the power to remove and change the railroad after construction anywhere except within the limits of a town or city was conferred by implication from the following language of the section: "But no change shall be made in any town or city after the road has been constructed without the consent of such town or city expressed through its proper authorities." After a railroad has been constructed in whole or in part, the change or alteration of the location of that part lying within the corporate limits of a town or city might cause municipal inconvenience; or, on the other hand, it might be more convenient both to the railroad and to the city that the location of its tracks should be changed so as to give better service in entering the town or in running through the corporate limits.

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It was doubtless to protect municipalities from possible inconvenience which might arise to them, and to guard against the broad construction which might be put upon the language of the act so as to affect such towns or cities, that the words last quoted were used. But from the mere use of the words "after the road has been constructed," in connection with such municipal control, the company was not by mere implication given power to tear up all of its lines outside of the corporate limits, or so much as it might desire, and change them at its will. Such a construction would practically give to railroad companies chartered under the general law a general commission to construct, tear up, and reconstruct their lines on entirely different routes at their pleasure, provided only that they did not take up the small portions of the tracks which might be within the limits of a town or city. The act confers no such authority. In 1903 an act was passed having the following caption: "An act to amend section 2171 of volume 2 of the Code of 1895, providing for the change of general direction and route of railroads, by adding at the end of said section authority to the directors and officers of railroad companies to relocate and reconstruct their line between the termini for the purpose of reducing grades and curvatures, and for other purposes." Acts 1903, p. 36. The exercise of this power itself is limited in the body of the act, and it has more special reference to the acquisition or building of a narrow-gauge line. The present case presents no effort to straighten curves or change grades or make small alterations for those purposes; and therefore we decide nothing on that subject. We think it clear that no such power was conferred by section 2171 of the Civil Code of 1895, as is contended by the defendant. It is further contended in the brief of counsel for plaintiffs in error that the defendant company was subject to the rules and regulations of the railroad commissioners, and that one of these rules prohibited the changing of stations without the consent of the commission. But, if we can take judicial cognizance of all the rules of the railroad commissioners, this point does not appear to have been made or passed upon by the court below. It appears that the defendant acquired the tracks and franchise of the Brunswick & Birmingham Railway Company, but under what character of sale or on what terms does not distinctly appear. Apparently it became the successor of that company, and is here treated as such both as to rights and duties incident to the position of a railroad company owning and operating a located and constructed road.

3. In discussing this branch of the subject, counsel for the defendant in error have treated the proposed change as being a relocation and construction; and have also urged that where a railroad company owns two lines between the same points it is not compelled to operate both at a loss, if the operation of one would accommodate the public. Whether this rule would apply in Georgia need not be determined, because the facts set up make no such case. The defendant in error has acquired two lines of

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railroad which cross each other or separate at an acute angle. It alleges that at a point some 19 miles beyond the point of separation it has leased from another railroad company a track some miles in length, extending from one of its lines to the other. It thereupon proposes to tear up and abandon altogether one of these lines from the point of intersection, and to the point where the leased line connects the two. The existence of a lease is alleged in the answer; but beyond this no proof in regard to it was introduced. At most, it does not make a case of the ownership of two lines between the same points. What are the terms of the lease, for how long is it to continue, whether the defendant in error has the right to terminate it or abandon the use at its option, or whether its lessor has a right to terminate the lease or to resume possession on any contingencies, nowhere appears. Certainly it cannot be successfully contended that the mere general assertion of the existence of a lease constitutes a relocation and reconstruction which would be a lawful substitute for the line which it is proposed to tear up. See *Coker v. A. K. & N. Ry. Co.*, 123 Ga. 483, 51 S. E. 481 (5). A number of the authorities cited on the part of the defendant in error are to the effect that if the charter of a railroad company simply authorizes it, without requiring it, to construct and maintain a railroad to a certain point, it cannot be compelled by mandamus to complete the road to that point or to operate a line or branch, or run trains of a certain character, or with certain schedules, at a loss. Without entering into a discussion of these various citations, it may be remarked that the facts in each are quite different from those now presented before us. The present case does not involve the application for a mandamus to compel a railroad to do some act of the character just indicated, or even to rebuild or restore a portion of a line that has been taken up. It is an application for injunction by persons who allege that they will be specially injured to prevent a railroad company from tearing up its tracks, and abandoning a portion of its line of road already constructed, in order to run its trains over a different route. Probably the strongest case presented for the defendant in error is that of *Jack v. Williams et al.* (C. C.), 113 Fed. 823. It is there stated broadly that "in the absence of special circumstances, or an express contract embodied in a charter, the owner of a railroad, whether a corporation or individual, cannot be compelled to maintain and operate the same at a loss. The duty arising from the ownership of the franchise is merely to meet the public requirements, and, where the traffic on a road is not sufficient to pay its operating expenses, such duty does not require its operation, and it may be abandoned." It appeared, however, that a short road 12 miles long had been dismantled by a receiver in charge of it under order of the court. After a sale of it, by intervention it was sought to require the purchasers to rebuild and operate the road. Under a statute of South Carolina, passed after the purchase by private individuals, natural persons were not permitted to operate a railroad without organization into a corporation. It

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was said: "The receiver having taken up and sold the rails under an order of court entered without opposition, the court could not require the owners to purchase new materials and rebuild the road, on an offer by intervenors to lease and operate the same if restored, especially in view of the fact that the franchise to operate it as a railroad had been forfeited." There is a wide difference between an effort by mandamus to compel action of this character, and a proceeding by injunction to stop the tearing up of a railroad track. *State v. Dodge City, etc., R. Co.*, 53 Kan. 377, 36 Pac. 747, 42 Am. St. Rep. 295; *Gates v. Boston, etc., R. Co.*, 53 Conn. 333, 343, 5 Atl. 695. If the test of profitability is to be applied, we are by no means certain that the mere selection of two or three small stations, and proof of the amount of business done at them disconnected from a general consideration of the line on which they are located, could be taken as conclusively showing the right to omit that part of the line altogether and relocate or run trains by another line partly owned by the same company and partly used by it under some character of lease. But it is unnecessary to consider this question.

4. It is contended that because some of the track has already been taken up, injunction to prevent the taking up of the balance should be refused. Where the thing sought to be done is completed, it is too late to apply for an interlocutory injunction to prevent it; but there is no rule of law, that because a thing has been begun, injunction will not be granted to stop its completion.

5. It is further urged that in this state a mandatory injunction will not be granted on an interlocutory hearing. And this may be true, if the substantial relief sought is affirmative. 115 Ga. 340, 41 S. E. 695. But we do not understand that a mandatory injunction to compel action of such a character is sought. If so, to that extent it should be denied.

6. It is also said that, if the dismantling of the section of the road involved in this controversy is unlawful, nevertheless the plaintiffs are not entitled to bring this action, but that it should be brought by the state. But if the plaintiffs will suffer special damages, not merely as members of the public, but by reason of their residences and the location of their businesses and investments, and shipments made by them, and the surrounding circumstances disclosed by the evidence, we do not see any reason why they may not bring an action to enjoin the removal of the road, if wrongful. This is especially true as to one of them, who testified that he has made investments and entered upon a business of cutting and shipping cross-ties and beginning "a turpentine business" on the faith of the location of the road and its stations, and that a removal would destroy his shipping facilities and irreparably damage him. *Macon & B. R. Co. v. Gibson*, 85 Ga. 2, 11 S. E. 442, 21 Am. St. Rep. 135 (6); *Sav., etc., Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 437, 44 Am. St. Rep. 43; *Leverett v. M. G. & A. R. Co.*, 96 Ga. 385, 24 S. E. 154 (2); *Coker v.*

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A. K. & N. R. Co., 123 Ga. 483, 51 S. E. 481; 1 Pomeroy's Eq. Jur. (3d Ed.) § 257.

7. Finally, it is said that the judgment of the presiding judge should be affirmed as being an exercise of discretion. We do not think that this result would follow from the evidence in the present case. It is entirely different from the case of *Kirkland et al. v. Atlantic & Bir. R. Co.* (decided to-day), 55 S. E. 23. In that case there was conflicting evidence on nearly every material or substantial issue of fact. And there was also evidence tending to show that the plaintiffs had lost by laches any right they might have had to claim an injunction, if they had any such right originally. Here there is no denial that the defendant is preparing to abandon, tear up, and remove a part of its line of railroad on which are located two or three stations and along which are situated the plaintiffs' residences and places of business, to which their means of access is by defendant's tracks. True, some other persons living in that section do not think that they will be damaged and desire the change to be made. But there is little or no conflict as to the fact that the plaintiffs will sustain injury. The real response of the defendant is that it has the right to make the change and to use its other track from a point where the two cross to another point where it asserts in an indefinite way that it has leased a road connecting the two lines, and that it has the right to abandon and tear up the track some 19 miles in length, which has heretofore been located and operated by the company under which it holds by purchase. We do not know what the evidence may show on the final hearing, or whether it will be such as to entitle the plaintiffs to a permanent injunction, nor do we decide whether or not plaintiffs can apply for a mandamus, or whether upon any application for it the writ will be granted. These questions will be determined when they arise. What we now hold is that, under the pleadings and the evidence, the presiding judge erred in refusing to grant an interlocutory injunction to prevent the defendant from further taking up and dismantling its track, and roadbed between the points described in the pleadings and evidence, until the final hearing.

8. The damages complained of by the plaintiffs would be of such an irreparable nature as authorized an application by equitable petition for injunction. In 16 Am. & Eng. Enc. L. (2d Ed.) 361, it is said: "An injury is irreparable either from its own nature, as when the part injured can not be adequately compensated in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or when it is shown that the party who must respond is insolvent, and for that reason incapable of responding in damages. See *Kerlin v. West*, 4 N. J. Eq. 453. As to injury to business, see *Brown & Allen v. Jacob's Pharmacy Co.*, 115 Ga. 451, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126. If the plaintiffs' contentions were true, their remedy at law would be inadequate.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

MILLCREEK TP. v. ERIE RAPID TRANSIT ST. RY. CO. *et al.*

(Supreme Court of Pennsylvania, June 27, 1906.)

[64 Atl. Rep. 901.]

Street Railroads—Franchise—Forfeiture.*—Where a street railway company obtained a franchise from a township to lay its tracks on a public road, with a provision that, when required by the township, it would remove its track from the side to the center of the road, after the road has been constructed, the township cannot declare a forfeiture of the franchise on refusal of the railway company to so move the track, where it was impossible, because the abutting owners on one side of the road would not give their consent to the construction of the track in the center of the road.

Appeal from Court of Common Pleas, Erie County.

Bill by the township of Millcreek against the Erie Rapid Transit Street Railway Company and Henry F. Walton. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, POTTER, ELKIN, and STEWART, JJ.

John S. Rilling and Henry E. Fish, for appellant.

Dwight M. Lowrey, Alfred R. Haig, Henry C. Thompson, Jr., William F. Harrity, and S. A. Davenport, for appellees.

PER CURIAM. It is found by the court below that the defendant company, with the consent of the road authorities of the plaintiff township, laid its tracks upon the south side of the highway, and has operated on them as a street passenger railway since 1901; further, that the consent of the said authorities was with a reservation of the right to require the company "at any time to remove its tracks from the side of said road to the center thereof," and that the road authorities, in pursuance of this reserved right, have directed the company to so remove the tracks. The defendant having failed to obey the direction, this bill was filed, *inter alia*, for a mandatory injunction to make the removal. The answer of defendant set up, among other things, that it had not been able to secure the consent of the property owners on the north side of the change of the location of the tracks to the center of the road.

It is conceded that the franchise to build the road could not be exercised until the consent of the township authorities had been obtained, and that such consent, having been given on condition, was ineffectual without performance of the precedent condition. The consent of the abutting landowners on the south

*See generally, foot-notes appended to *Wheeling, etc., R. Co. v. Triadelphia* (W. Va.), 20 R. R. R. 336, 43 Am. & Eng. R. Cas., N. S., 336.

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side of the highway was also a legal prerequisite to the location of the tracks on that side, without regard to any agreement the township and the company might make; and, had the company failed to obtain such consent, its grant would not have been available, for failure of performance of a condition precedent, even by reason of its impossibility, defeats the grant. But in the present case the condition was performed, the consent obtained, and the road constructed and operated for more than three years, in compliance with all the legal requirements. The obligation to move the tracks to the middle of the road, though valid and binding, was part of a condition subsequent, as to which the rule is different. Impossibility excuses failure of performance, and defendant has set up a legal impossibility in the refusal of the property owners to consent and the absence of any legal means of compelling consent. The learned judge below made a careful decree enjoining the performance of certain car service prayed for, and ordering the defendant to remove its tracks from the south side to the center of the road "as soon as it may lawfully be done." This was all that the appellants were entitled to ask.

Decree affirmed.

TRIMBLE *et al.* v. TEXARKANA & FT. S. RY. CO.

(Supreme Court of Missouri, June 30, 1906. Rehearing Denied Oct. 19, 1906.)

[97 S. W. Rep. 164.]

Attorney and Client—Compensation—Employment—Related Corporations—Implied Contracts—Services of Attorneys.—Plaintiffs were employed as attorneys by the G. company, which owned the stock and bonds of and controlled the T. and S. companies, and operated the whole line of railroads owned by them; and, without any other express contract, they rendered services for all the companies for several years, rendering bills therefor to, and being paid by, the G. company, till institution of suit to foreclose the mortgage of the G. company, as collateral for which the bonds and stock of the T. company had been hypothecated; and in such suit, in which receivers were appointed, so that earnings of the T. company no longer came directly to the G. company, plaintiffs continued to render services to all the companies. Held, that a contract of the T. company to pay plaintiffs for the services rendered it in such suit could be implied, notwithstanding the relation of the companies.

Appeal from Circuit Court, Jackson County; Jas. Gibson and A. L. Cooper, Special Judges.

Action by J. McD. Trimble and others against the Texarkana & Ft. Smith Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

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Lathrop, Morrow, Fox & Moore and Cyrus Crane, for appellant.

J. A. Eaton, for respondent.

VALLIANT, J. Plaintiffs, who are attorneys at law, sue to recover the value of legal services alleged to have been rendered by them to defendant in certain negotiations and suits which resulted in a foreclosure of the mortgages and a reorganization of a system of railroads of which the defendant was one of the constituent parts. The Kansas City, Pittsburg & Gulf Railroad Company was a Missouri corporation operating a system of railroads extending from Kansas City Mo., to Port Arthur, Tex. One of the railroads in the system was that of the defendant, the Texarkana & Ft. Smith Railway Company, a Texas corporation, and another that of the Kansas City, Shreveport & Gulf Railway Company, a Louisiana corporation. The Kansas City, Pittsburg & Gulf Railroad Company, the Missouri corporation which hereinafter we will call the "Gulf Company," owned or controlled all of the stock and the bonds issued by the other two companies and operated the whole line. On the one side, it is said that the Gulf Company, the Missouri corporation, was really the parent and owner of the whole system extending from Kansas City to the Gulf; that the Texas and Louisiana corporations were but subsidiary organizations; that the only reason for the organization of a separate corporation in Texas was that by the laws of that state a domestic corporation only could own or operate a railroad therein, and the reason for the Louisiana corporation was that only a Louisiana corporation could exercise the right of eminent domain in that state. The plaintiffs, on the other hand, deny that the Texas corporation was a mere subsidiary organization, and assert that it was formed before the Missouri corporation was, but, at all events, it was, under the laws of Texas, required to have and did have its offices and officers in that state; that it owned 200 miles of railroad, and had issued its mortgage bonds to the amount of \$5,591,000. But plaintiffs admit that the Gulf Company owned all of the stock and bonds of the Texas company and had hypothecated them as collateral security for its own mortgage bonds and other indebtedness, and it operated the whole system as one road. For several years before the litigation out of which this suit arises, the plaintiffs had been the attorneys for the Gulf Company, and under that employment had rendered services to the defendant, the Texas company, and also to the Louisiana company. They always rendered their bills to the Gulf Company, and the latter paid them, and that course of business continued down to the time when, under the foreclosure litigation out of which this suit grew, receivers for the several roads were appointed. About the 1st of April, 1899, the Gulf Company made default in payment of its mortgage debt, and a suit was filed against it in the state circuit court in Jackson county, in the name of Grannis and others as plaintiffs, under which receivers

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were appointed who took charge of the railroad in Missouri. The plaintiffs in the suit at bar were the attorneys who filed that suit for Grannis, but it was done at the instance of the Gulf Company and to forestall an anticipated suit from a more hostile source. That suit was removed into the federal court on the petition of one of the defendants, and, pending a motion to remand it to the state court, the State Trust Company, a foreign corporation, one of the trustees in the deed of trust that was being foreclosed, filed a like suit in the federal court at Kansas City praying a receiver, foreclosure, etc.

The only real controversy seems to have been in regard to who should dominate the litigation. That point was finally settled by agreement between the plaintiffs as attorneys in the Grannis suit representing the Gulf Company on the one side, and the attorneys who had filed the other foreclosure suit in the federal court and who represented the creditor interest, on the other side; the substantial point in the agreement being that one set of receivers should be appointed by the federal court who should have charge of the whole system of railroads from Kansas City to the Gulf, and that these plaintiffs and the attorneys who had commenced the suit in the federal court were to be employed as the attorneys for the receivers along the whole line. After that agreement was reached, an amended bill was filed in the federal court in which this defendant, the Texas company, and the Louisiana company were made parties defendant, and their appearance was entered. Thereafter everything was harmonious, and the cause proceeded to a final decree of foreclosure, a sale followed, and the property of the railroad companies passed into the ownership and possession of a corporation formed for the purpose by agreement of the parties called the "Kansas City Southern Railway Company," and the receivership was wound up. Before the final decree the whole matter had been settled by agreement, and the final proceedings in court were in accordance with the agreement. The agreement also covered other valuable railroad properties theretofore controlled by the Gulf Company, consisting of terminal railroads at Kansas City and at the Gulf end of the line. In addition to the suits above mentioned, there were other suits, in Texas, in Louisiana, and Kansas which are mentioned in the evidence; but these served their purpose, which seems to have been a race of diligence for the control of the litigation through receiverships, and were dismissed when an agreement was reached. The suit in the federal court in Kansas City was begun in April, 1899, and ended (except as it may be yet retained for settlement of accounts and other details of administration) in March, 1900, and it is during that period that the plaintiffs in the suit at bar claim to have rendered the services to the defendant, the Texarkana & Ft. Smith Railway Company, for which this suit is brought. During that period these plaintiffs received as attorneys for the receivers sums aggregating \$21,833.33, and the attorneys who represented the creditor in-

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terest, and who under the agreement first above mentioned were also attorneys for the receivers, received a like amount. Those plaintiffs also received other amounts on account of services rendered in other suits that were more or less connected with the main litigation above mentioned, but neither the amounts so received nor those for services as attorneys for the receivers covered the services sued for in this case. March 30, 1900, these plaintiffs filed a petition in the foreclosure suit in the federal court asking to be allowed counsel fees for services to the Gulf Company in the sum of \$3,000, to the Texarkana & Ft. Smith Company (this defendant) in the sum of \$1,000, and a like sum, \$1,000, for services to the Louisiana company. Afterwards that petition was amended increasing the claims to \$10,000 against each company, and suits in the circuit court of Jackson county were filed against those three companies, respectively, each for \$10,000. That petition is still pending in the unfinished business of the foreclosure suit in the federal court. Plaintiffs, in their testimony, explained that the former claim was for services rendered between the 1st and the 28th of April, 1899, and the latter embraced services rendered during the whole litigation down to the final decree and the master's report. According to the plaintiffs' testimony, the nature of the services rendered was in watching and guarding the interest of the three railroad companies, respectively, in the negotiations leading up to the reorganization agreement and in seeing, during the litigation and its culmination, that the companies they represented got what was coming to them in the way of their positions in the reorganized company, and that those services were well worth \$10,000 for each company, especially so as measured by the standard of value put upon the services of the attorneys, who represented the creditor interest, whom they said were allowed by the court and paid very much larger sums. The testimony on the part of the defendant tended to prove that the plaintiffs had very little to do with the negotiations leading up to the reorganization agreement or with the litigation, and that what they did was of no value to the railroad companies whom they claim to have represented. The cause was tried by the court, jury waived, and resulted in a judgment for the plaintiffs for \$10,000, from which defendant appeals.

This is the second one of the three suits above mentioned brought by these plaintiffs against the railroad companies, respectively, to recover for their legal services, that has reached this court. The first one that came here was the one against the Gulf Company, and in that we affirmed a judgment for the plaintiffs for \$10,000. *Trimble v. K. C. P. & G. R. R.*, 180 Mo. 574, 79 S. W. 678. This case rests on substantially the same state of facts that were in that case, with one point of difference only, and the decision in that must be decisive of this, unless the point of difference referred to leads to a different result. The point of difference is this: The former suit was against the Gulf Company, which, as we have seen, practically owned the two other

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companies and operated them. The evidence showed that the plaintiffs were employed by the Gulf Company while it was operating the whole system, that they rendered services to the two other corporations for several years prior to these foreclosure suits, and always rendered their bills to the Gulf Company which paid them. As a practical business matter there was nothing in that practice that would estop the plaintiffs from asserting a claim for such services against the Texas company by its own name, if they had seen fit to do so. But knowing, as the plaintiffs did, that the Gulf Company held the purse of the Texas company and directed its affairs, it was natural that they should apply to the Gulf Company for their pay. There was no other source from which payment could be expected. But, when the receivers were appointed, the Gulf Company was no longer in receipt of the earnings of the Texas company, and, though still owning its stocks and bonds, had nothing of its revenue from which to pay its debts. When that change of conditions came about, there was no reason why the plaintiffs in rendering services to the Texas company should be presumed to be doing so with the understanding that they were to look to the Gulf Company alone for payment.

The plaintiffs, in the beginning, were employed by the Gulf Company. They never had an express contract with the defendant company. Under their employment by the Gulf Company they rendered services to all the companies under its control, the defendant included, and, without any express change in the relation, the plaintiffs, according to their evidence, continued to serve the companies until the coming in of a confirmation of the master's report in the federal court. Defendant insists that, under those conditions, no implied contract arises. The argument is that the defendant company, with all its stock and bonds in the hands of the Gulf Company, and all its property inevitably destined to be swept away in the foreclosure suit, was helpless; it was incapable of making any contract or of consenting to anything that might be done in its behalf. That is defendant's main point of resistance in this case. But, in fact, the defendant had its offices and officers as the law of Texas required in that state. We may infer from the conditions that the Gulf Company, as owner or controller of the stock, elected the officers and directors and conceded to them control only to the extent that the law of Texas required, still the power to make contracts for the corporation in contemplation of law existed in the officers and directors, and, though their acts may have been influenced or dictated by those who held the stocks and bonds of the corporation, still they were the acts of the corporation. Officers and directors of a corporation, though laboring under an influence, can, by their conduct, give rise as well to an implied contract as they can to a contract by express agreement. If we should say that there can be no implied contract arising out of their conduct because they were not free to act, but yielded to pressure, we would also have

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to say that their express contract was for the same reason without legal effect. The stockholders of a corporation direct its business as they think is best for their own interest, and if it so happen that the persons who own the stock in one company are also the owners of the stock in another company, and conceive it to be to their interest to make the one corporation subservient to the other, they have a right to do so, because they are dealing with their own. What is here said is, of course, subject to this qualification; that is, that the conduct of the stockholders rendering one corporation subservient to another is valid only when it is not in violation of any law forbidding it. But there is no such question here. We are now dealing with a subject in which an owner of two properties sees fit to use one to the advancement of the other, or both to a mutual advancement. In such case neither corporation loses its corporate entity. Helpless the Texas corporation may have been when all its stocks and bonds were given up as collaterals to the mortgage bonds of the Gulf Company, and when its physical property was taken out of the hands of its officers by the receivers; but, in that condition, it was practically not worse off than the Gulf Company itself, when it could not pay its debts and the receivers had taken possession of everything of value that belonged to it. Even now, after the floors of its treasure house have been swept and garnished by a master in chancery, the defendant corporation shows that it is still alive and with vigor enough to defend this suit and interest sufficient to choose its counsel from among the ablest lawyers in the state. It may be that after the foreclosure suit was begun little could be done in behalf of this defendant, that the end was inevitable, still the corporation existed, its officers were yet alive, and they had the right to strive for the best terms they could obtain. If services in that effort were made by these plaintiffs in behalf of the defendant corporation with the knowledge of its officers and under such circumstances as justify an inference that they approved and encouraged what was being done, we are not prepared to say that, because of the desperate straits into which the corporation had fallen, a contract for the payment of the value of the services rendered could not be implied. Whether in point of fact any real benefit was derived from the services rendered, the testimony for the plaintiffs and that for the defendant are widely apart. It is a question of fact, and the trier of the facts has made the finding, and with that we must be content.

It was shown in the evidence that in some of the suits mentioned the plaintiffs occupied, at least nominally, positions antagonistic to the interests of their clients, but that was never really so. In all that they ever did they were loyal to the interests of their clients. The criticisms of the rulings of the court in giving, modifying, and refusing instructions are based on the propositions above discussed and what we have said of them applies to the rulings on the instructions.

It is argued that the judgment in the suit against the Gulf

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Company is a satisfaction of this claim, but, in the first place, there is no such defense set up in the answer, nor is there any proof or even suggestion of satisfaction of that judgment, while the foreclosure decree and proceedings thereunder indicate that there is as little left in the treasury of the Gulf Company as there is in that of the defendant; and, in the second place, the plaintiffs' petition in the federal court shows that their claim against one company is independent of that against the other, and the three suits all pending at the same time in the circuit court of Jackson county negative the idea that the claim against one is merged in that against the other.

We find no error in a matter of law in the record.

The judgment is affirmed. All concur.

STATE v. INTOXICATING LIQUORS.

(Supreme Judicial Court of Maine, July 10, 1906.)

[64 Atl. Rep. 812.]

Commerce—Intoxicating Liquors—C. O. D. Interstate Shipment—Illegal Seizure.*—Certain consignors entered into a contract with an express company for the transportation of a box of intoxicating liquors from Covington, Ky., to No. 4 Byron street, Rumford Falls, Me. It was a C. O. D. shipment, and it was the unquestioned duty of the express company either to make a personal delivery of the package to the consignee, or to leave it at his residence or place of business designated as No. 4 Byron street. The liquors were intended for unlawful sale in Maine. While these liquors were in the office of the express company at Rumford Falls, they were seized by a deputy sheriff by virtue of a search and seizure warrant duly issued by a court of competent jurisdiction, and taken away.

The transportation of the liquor from the office of the express company at Rumford Falls to No. 4 Byron street, was a part of a continuous interstate shipment from Kentucky to the street and number designated at Rumford Falls, and the package was protected from the operation of the laws of Maine until the act of transportation was consummated by the delivery of the package at its place of ultimate destination in this state. The seizure was made before the transportation was terminated and was an interruption of an interstate shipment. It was therefore premature and unauthorized.

Same.—While, therefore, intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, section 31 of chapter 27 of the Revised Statutes of 1883, as amended in section 39 of chapter 29 of the Revised Statutes of 1903,

*See foot-note appended to *American Express Co. v. State of Iowa* (U. S.), 15 R. R. R. 268, 38 Am. & Eng. R. Cas., N. S., 268.

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so far as it applies to interstate commerce transportation, must be deemed incompatible with the interstate commerce clause of the federal Constitution.

(Official.)

Report from Supreme Judicial Court, Oxford County.

Search and seizure process by the commonwealth against box of intoxicating liquors, and Lawrence Pembroke interposed a claim. Case reported, and judgment for claimant.

The complaint, omitting the formal parts, was as follows:

"Harris L. Elliot, of Rumford, in the county of Oxford, competent to be a witness in civil suits, on the 23d day of January, A. D. 1904, in behalf of said state, on oath complains that he believes that on the 23d day of January, in said year at said Rumford, intoxicating liquors were, and still are, kept and deposited by Lawrence Pembroke, of Rumford, in said county, in a box marked 'Lawrence Pembroke, Rumford Falls, Me., C. O. D. \$15,' now in the American Express Office and its appurtenances, situated in said Rumford, the said Pembroke not being then and there authorized by law to sell intoxicating liquors within said state, and that said liquors then and there were and now are intended for sale by the said Pembroke within said state in violation of law, against the peace of said state, and contrary to the form of the statute in such case made and provided.

"Wherefore, the said complainant prays, that due process be issued to search the premises and the person hereinbefore mentioned, where said intoxicating liquors are believed to be deposited, and, if there found, that said liquors and vessels be seized and safely kept until final action and decision be had thereon, and that the said Pembroke be forthwith apprehended and held to answer to this complaint and to do and receive such sentence as may be awarded against him."

Upon this complaint a search and seizure warrant of the same date as the complaint was issued by said court and placed in the hands of the complainant, who was a deputy sheriff, for service. By virtue of this warrant, the deputy sheriff on the same day searched the American Express office at Rumford Falls, "and there found and seized the following described intoxicating liquors, to wit: One box marked 'Lawrence Pembroke, Rumford Falls, Me., C. O. D. \$15,' containing 20 quart bottles full of whisky" and "five half-pint bottles full of whisky."

Under the provisions of section 50 of chapter 49 of the Revised Statutes, the officer then filed a libel against these liquors and the vessels in which they were contained, in the aforesaid court, and a time for a hearing thereon was fixed by said court, and notice thereof given as provided by the aforesaid section 50.

On the return day of the libel, the consignee, Lawrence Pembroke, filed in said court a claim for these liquors in accordance with the provisions of section 51 of chapter 49 of the Revised Statutes, alleging "that they were not so kept and deposited for

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unlawful sale as alleged in the libel." Thereupon a hearing was had and the judge of said court found that the liquors were intended for illegal sale, and were liable to seizure, and accordingly condemned the same and ordered them to "be turned over to the sheriff of Oxford county, they being found to contain more than 20 per cent. of alcohol."

From this judgment condemning these liquors the claimant appealed to the Supreme Judicial Court to be held at Paris on the second Tuesday of March, 1904. At said March term of the Supreme Judicial Court an agreed statement of facts was filed, and the case was then reported to the law court for decision.

The agreed statement of facts fully appears in the opinion.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Ellery C. Park, Co., Atty., for the State,
Bisbee & Parker, for claimant.

WHITEHOUSE, J. This case comes to the law court upon the following agreed statement of facts:

"On January 23, 1904, one box of intoxicating liquors consigned C. O. D. express prepaid, by Crigler & Crigler, Covington, Ky., to Lawrence Pembroke, 4 Byron street, Rumford Falls, Me., was seized from the office of the American Express Company at Rumford Falls by H. L. Elliott, a deputy sheriff for Oxford county, and the liquors were thereafter duly libeled.

"Pembroke filed a claim for the liquors at the return day of the libel, but upon the facts then presented the judge of the Rumford Falls municipal court found that the liquors were intended for illegal sale and were liable to seizure, and the same were condemned, from which judgment the claimant appealed to the Supreme Judicial Court.

"It is agreed for the purpose of this case that the liquors were intended for illegal sale within this state by the consignee. It is further agreed that the box of liquors arrived at Rumford Falls on the 11:35 a. m. train January 23, 1904, and were immediately taken by the express company to its office at Rumford Falls, and were there seized by a deputy sheriff for Oxford county, about 1:30 p. m. on the same day.

"It was the custom of the express company at Rumford Falls to deliver express packages at the residence of the consignee, provided his address was given or he was known to the express company and lived within the limits of Rumford Falls village. No. 4 Byron street is within the limits of the village.

"Most of the express was not delivered until after the afternoon train went out at 2:40 p. m., and this box was intended to be delivered at that time.

"If, upon the foregoing statement, the law court decides that the liquors were liable to seizure and condemnation, the judgment of the lower court shall be affirmed, otherwise judgment is to be rendered for the claimant and the liquor ordered returned."

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It sufficiently appears from the foregoing statement of facts that, pursuant to an order from the claimant, the consignors entered into a contract with the express company for the transportation of the box of liquors in question from Covington, Ky., to No. 4 Byron street, Rumford Falls, Me. It was the unquestioned duty of the express company either to make a personal delivery of the package to Lawrence Pembroke, or to leave it at his residence or place of business designated as No. 4 Byron street.

The custom generally prevailing in the early history of common carriers, of depositing in a warehouse at the place of destination all packages transported by them, either with or without notice to the consignee of such deposit, proved to be inadequate to meet the public demand for greater safety and dispatch in the transportation and delivery of valuable parcels. Hence arose the necessity for improved methods involving an obligation on the part of the carrier to make delivery of such parcels to the consignee in person. "This necessity was supplied by what are known in this country as express companies, which undertake to carry goods of this class and to make a personal delivery of them to the consignee; and to this public profession they are held by the law with great strictness." Hutchinson on Carriers, § 379, and authorities cited. In *Packard v. Earle et al.*, 113 Mass. 280, the defendants were express carriers over the line of the Boston & Providence Railroad from Providence to Boston, and in that capacity received the plaintiff's trunk for transportation, marked "Henry M. Packard, West Mansfield." In accordance with the uniform course of business of the defendants at that station, the trunk was delivered to the station agent at that place. It was deposited with him in the morning and notice of its arrival given to the plaintiff in the afternoon; but, before he had an opportunity to remove it, the station was forcibly entered and the trunk stolen. Although in that instance the place of delivery was not designated by street and number, the defendants were held liable for the loss of the trunk. In the opinion the court says: "It was the duty of the defendants, as common carriers, to deliver the trunk to the plaintiff personally, or at his residence at West Mansfield, and until such delivery their liability as carriers continued. See, also, *Sullivan v. Thompson et al.*, 99 Mass. 258; Am. & Eng. Enc. of Law, vol. 12, p. 550; and Cyc. of Law and Proc., vol. 6, p. 466. But it should be unnecessary to cite authorities in support of a proposition so obvious and elementary.

Furthermore the package in this case appears to have been sent C. O. D. It would consequently have been impracticable, under ordinary circumstances, for the express company to perform the obligation thus assumed to collect the purchase price for the consignors without personal delivery to the consignee, or to his authorized agent at the place designated in the waybill. The package arrived at Rumford Falls on the 11:35 a. m. train and was immediately taken by the express company to its office at that

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place. The company was ready and willing to complete the transportation by delivering the box at No. 4 Byron street on the arrival of the 2:40 p. m. train, according to its usual course of business. The express charges had been paid for a continuous shipment over the entire line from Covington, Ky., to the residence of the consignee at No. 4 Byron street, Rumford Falls, Me., and the express company in fact intended to deliver the box at the street and number designated, according to its established custom, on the arrival of the afternoon train, but was prevented from so doing by the seizure of the package made at the express office within 1½ hours after its arrival there.

The method of transmission was not specified except that the package was to be forwarded by express, and it is obviously immaterial that the means of transportation to be employed in making the delivery at either terminal point may have been by wagons or drays in lieu of railroad cars. The consignee was entitled to have his package delivered at No. 4 Byron street, and the company had a right to select the means of transportation and to make the delivery in accordance with its established usage. And it is common knowledge that the time intervening between the actual arrival of the package at the office of the company and the usual time when it was intended to be delivered was no greater than the delay ordinarily incident to the delivery of express matter in the usual course of business in similar places. The conclusion is therefore irresistible that the transportation in this case had not been terminated and that the seizure of the liquor in question was made while the package was in transit and before its delivery to the consignee according to the express terms of the shipment.

It is accordingly contended in behalf of the claimant that the seizure of the package under the circumstances stated was clearly in violation of the third clause of section 8 of article 1 of the Constitution of the United States, conferring upon Congress the power "to regulate commerce with foreign nations and among the several states."

In *State v. Intox. Liquors*, Grand Trunk Ry. Claimant, 94 Me. 335, 47 Atl. 531, the liquor was taken from the car of the railway company while it was standing on the siding at Auburn before it had reached its destination in Lewiston. It was sought to justify the seizure thus made while the liquor was in transit and before its delivery to the consignee, by virtue of the provision of chapter 728 of the act of Congress of August 8, 1890, known as the "Wilson Act," 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], and by that clause of section 31 of chapter 27 of the Revised Statutes of Maine of 1883 which declares that "no person shall knowingly bring into the state or knowingly transport from place to place in the state, any intoxicating liquors with intent to sell the same in the state in violation of law," and that "all such liquors * * * may be seized in transit." But the construction of the Wilson act was brought directly in question in the case of *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, and it is declared in the majority opinion that "in-

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terpreting the statute by the light of all its provisions, it was not intended to, and did not, cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment and until its arrival at the point of destination and delivery there to the consignee." In the same opinion, in commenting upon *Bowman v. Chicago & N. Railway*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700, the court further say: "It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned." It is true that the distinction between the deposit of the package in a warehouse to await the action of the consignee, and the actual delivery of it to the consignee in person, or the difference between a shipment by freight and a shipment by express, was not brought directly in question and was not necessarily involved in the decision of either *Bowman v. Railway*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700, or *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, but as pointed out by this court in *State v. Intoxicating Liquors*, 95 Me. 140, 47 Atl. 531, it was distinctly held in *Rhodes v. Iowa* that the moving of the package in question in that case from the platform to the freighthouse was a part of interstate commerce shipment, and that the transportation was not completed until the package had been moved to and deposited within the freighthouse. *Rhodes v. Iowa* has accordingly been recognized as authority for the doctrine that a package thus shipped from one state into and across another was protected by the interstate commerce clause of the Constitution until the act of shipment was completed according to the terms of the contract of transportation between the parties.

It was accordingly held by this court in *State v. Intox. Liquors*, *Grand Trunk Ry. Claimant*, 94 Me., *supra*, upon the authority of *Rhodes v. Iowa*, that section 31 of chapter 27 of the Revised Statutes of Maine of 1883, declaring that "no person shall knowingly bring into the state * * * any intoxicating liquors with intent to sell the same in the state in violation of law," must be deemed repugnant to the interstate commerce clause of the federal Constitution, and that the seizure in that case was made while the liquor continued to be an interstate shipment before the transportation of it had terminated and before it had become subject to the operation of the law of this state.

The facts in the case at bar are essentially different from those in *State v. Intox. Liquors*, 95 Me. 140, 47 Atl. 531, and the cases are clearly distinguishable. In that case the liquors were shipped from Boston, Mass., by railroad lines to Machias, Me., consigned to the shippers. They arrived at 9 o'clock in the morning and were deposited in the railroad company's freighthouse, where they were seized at 4 o'clock p. m. the next day. "The transportation had been completed," said the court. "Nothing further remained

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to be done by the railroad company. The liquors had arrived at their final place of destination. They were not again to be removed by the railroad company. The continuity of transportation from the place of shipment to the place of consignment had not been interrupted, and the liquor had been moved to the place provided by the carrier for the purpose to await the action of the shipper."

"It is true that no notice had been given of their arrival. There was nobody there to whom notice could have been given."

But in *American Express Co v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417, the question of a shipment by Express C. O. D. was necessarily involved and directly determined. In that case the plaintiff received four packages of intoxicating liquor at Rock Island, Ill., to be carried to Tama, Iowa, and there delivered to four different persons, one of the packages being consigned to each. The shipment was C. O. D., \$3 to be collected for the price of each package and 35 cents additional for the express charges on each. Upon the arrival of the packages at Tama, they were seized in the hands of the express agent by virtue of an information charging that they contained intoxicating liquors intended for unlawful sale. Without passing upon the question whether the property in a C. O. D. shipment is at the risk of the buyer or seller, and without deciding when the sale is completed, the federal court held that the packages in question, received by an express company in Illinois to be carried to the state of Iowa and there delivered to the consignees C. O. D. for the price of the package and the expressage, were interstate commerce under the protection of the commerce clause of the federal Constitution, and that prior to their actual delivery to the consignees they could not be confiscated under the prohibitory liquor laws of Iowa.

In the case at bar the transportation of the liquor in question from the office of the express company at Rumford Falls to No. 4 Byron street was a part of a continuous interstate shipment from Kentucky to the street and number designated at Rumford Falls, and the package was protected from the operation of the laws of Maine until the act of transportation was consummated by the delivery of the package at its place of ultimate destination in this state. The seizure was made before the transportation was terminated, and was an interruption of an interstate shipment. It was therefore premature and unauthorized.

While therefore intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, section 31 of chapter 27 of the Revised Statutes of 1883, above quoted, as amended in section 39 of chapter 29 of the Revised Statutes of 1903, so far as it applies to interstate commerce transportation, must still be deemed incompatible with the interstate commerce clause of the federal Constitution.

The entry must therefore be:

Judgment for the claimant.

Order for a return of the liquors to issue.

PEOPLE OF THE STATE OF NEW YORK upon the Relation of the
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plff. in Err., *v.* NATHAN L. MILLER, as Comptroller of the
State of New York. SAME *v.* OTTO KELSEY, as Comptroller
of the State of New York.

(Argued April 9, 1906. Decided May 28, 1906.)

[26 Sup. Ct. Rep. 714.]

Constitutional Law—Due Process of Law in Corporate Taxation.*

—A domestic railway corporation is not deprived of its property without due process of law because no reduction is allowed from the capital stock, taken as the basis of the franchise tax imposed by N. Y. Laws 1896, chap. 908, § 182, on account of the considerable proportion of its rolling stock which, by the familiar course of railway business, is always absent from the state.

Interstate Commerce—State Regulation—Corporate Taxation.†

Interstate commerce is not unconstitutionally interfered with by the franchise tax imposed upon a domestic railway corporation by N. Y. Laws 1896, chap. 908, § 182, because no deduction is allowed from the capital stock, taken as the basis of the tax, on account of the considerable proportion of its rolling stock which, by the familiar course of railway business, is always absent from the state.‡

Two writs of error to the Supreme Court of the State of New York to review judgments enforcing a franchise tax imposed on a domestic railway corporation, entered pursuant to the mandate of that court, which, on a second appeal, had affirmed a judgment of the Appellate Division of the Supreme Court for the Third Department, which had, on writs of *certiorari*, affirmed the determination of the state comptroller. Also—

Three writs of error to the Court of Appeals of the State of

*For the authorities in this series on the subject of the right to tax the rolling stock of railroad corporations as affected by the fact that it is, or is not, within the state imposing the tax, see foot-note appended to *Union Refrigerator Co. v. Kentucky* (U. S.), 18 R. R. R. 690, 41 Am. & Eng. R. Cas., N. S., 690.

For the authorities in this series on the subject of double taxation of railroad companies, see foot-notes appended to *Cumberland T. & T. Co. v. Hopkins* (Ky.), 18 R. R. R. 673, 41 Am. & Eng. R. Cas., N. S., 673.

†For the authorities in this series on the subject of state regulation of interstate commerce, see foot-notes appended to *United States Exp. Co. v. State* (Ind.), 18 R. R. R. 73, 41 Am. & Eng. R. Cas., N. S., 73; foot-notes appended to *Illinois Cent. R. Co. v. Mississippi R. R. Comm'n* (C. C. A.), 17 R. R. R. 544, 40 Am. & Eng. R. Cas., N. S., 544; foot-note appended to *State v. Union Tank Line Co.* (Minn.), 17 R. R. R. 682, 40 Am. & Eng. R. Cas., N. S., 682 (right of state to tax cars used in interstate commerce, but temporarily within its borders).

‡Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, § 128.

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New York to review judgments affirming judgments of the Appellate Division of the Supreme Court for the Third Department, which had affirmed the determination of the state comptroller in assessing such franchise tax. *Affirmed.*

See same case below for No. 81, Appellate Division, 89 App. Div. 127, 85 N. Y. Supp. 1088; in Court of Appeals, 177 N. Y. 584, 69 N. E. 1129. For No. 82, 177 N. Y. 584, 69 N. E. 1129. For Nos. 586-588 (N. Y.) 76 N. E. 1104

The facts are stated in the opinion.

Messrs. Albert H. Harris, Ira A. Place, and Thomas Emery, for plaintiff in error.

Messrs. Julius M. Mayer and Horace McGuire, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court:

These cases arise upon writs of *certiorari*, issued under the state law and addressed to the state comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903, and 1904, respectively. The tax was levied under New York Laws of 1896, chap. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations.—Every corporation * * * incorporated * * * under * * * law in this state, shall pay to the state treasurer annually, an annual tax, to be computed upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount," at a certain rate, if the dividends amount to 6 per cent. or more upon the par value of such capital stock. "If such dividend or dividends amount to less than 6 per centum on the par value of the capital stock [as was the case with the relator], the tax shall be at the rate of 1½ mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, etc., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state."

The relator is a New York corporation, owning or hiring lines without as well as within the state, having arrangements with other carriers for through transportation, routing, and rating, and sending its cars to points without as well as within the state, and over other lines as well as its own. The cars are often out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the state. In short, by the familiar course of railroad business a considerable portion of the relator's cars constantly is out of the state, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order

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to find the capital stock employed within the state. This contention the comptroller disallowed.

The writ of *certiorari* in the earliest case, No. 81, with the return setting forth the proceedings of the comptroller, Knight, and the evidence given before him, was heard by the appellate division of the supreme court, and a reduction of the amount of the tax was ordered. 75 App. Div. 169, 77 N. Y. Supp. 401. On appeal, the court of appeals ordered the proceedings to be remitted to the comptroller, to the end that further evidence might be taken upon the question whether any of the relator's rolling stock was used exclusively outside of the state, with directions that, if it should be found that such was the fact, the amount of the rolling stock so used should be deducted. 173 N. Y. 255, 65 N. E. 1102. On rehearing of No. 81, and, with it, No. 82, before the comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the state during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. But, in all of them, evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned, as has been stated, evidence of the relator's road mileage outside and inside of the state, and also evidence of the car mileage outside and inside of the state, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the state during the whole tax year. The comptroller refused to make any reduction of the tax, and, the case being taken up again, his refusal was affirmed by the appellate division of the supreme court and by the court of appeals on the authority of the former decision. 89 App. Div. 127, 85 N. Y. Supp. 1088, 177 N. Y. 584, 69 N. E. 1129. The later cases took substantially the same course. The relator saved the questions whether the statute, as construed, was not contrary of article 1, § 8, of the Constitution of the United States, as to commerce among the states; article 1, § 10, against impairing the obligations of contracts; article 4, § 1, as to giving full faith and credit to the public acts of other states; and the 14th Amendment. It took out writs of error and brought the cases here.

The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the court of appeals was wrong. Of course, if the statute, as construed, is valid under the Constitution, we are bound by the construction given to it by the state court. In this case we are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the state during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the state during the whole tax year. The proposition really was conceded, as we have said, and the evidence that was

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offered had no tendency to prove the contrary. If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the state. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the state all the time.

In view of what we have said it is questionable whether the relator has offered evidence enough to open the constitutional objections urged against the tax. But, as it cannot be doubted, in view of the well-known course of railroad business, that some considerable proportion of the relator's cars always is absent from the state, it would be unsatisfactory to turn the case off with a merely technical answer, and we proceed. The most salient points of the relator's argument are as follows: This tax is not a tax on the franchise to be a corporation, but a tax on the use and exercise of the franchise of transportation. The use of this or any other franchise outside the state cannot be taxed by New York. The car mileage within the state and that upon other lines without the state affords a basis of apportionment of the average total of cars continuously employed by other corporations without the state, and the relator's road mileage within and without the state affords a basis of apportionment of its average total equipment continuously employed by it respectively within and without the state. To tax on the total value within and without is beyond the jurisdiction of the state, a taking of property without due process of law, and an unconstitutional interference with commerce among the states.

A part of this argument we have answered already. But we must go further. We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts, it must be sustained by us. It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 353, 49 L. ed. 1077, 1081, 25 Sup. Ct. Rep. 669. This seems to be regarded as such a tax by the court of appeals in this case. See *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433, 439, 67 L. R. A. 960, 70 N. E. 967. If it is a tax on any franchise which the state of New York gave, and the same state could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the state court regards it.

Suppose, then, that the state of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of

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the state. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 201, 211, *ante*, 36, 26 Sup. Ct. Rep. 36; *Deleware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 519, 23 Sup. Ct. Rep. 468. But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicile, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, *ante*, 679, 26 Sup. Ct. Rep. 679. See also *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 208, 209, *ante*, 36, 26 Sup. Ct. Rep. 36.

It was suggested that this case is but the complement of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, and that, as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the state bore to the whole number of miles over which its cars were run, so here, in the domicile of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But, in that case, it was found that the "cars used in this state have, during all the time for which tax is charged, been running into, through, and out of the state." The same cars were continuously receiving the protection of the state, and, therefore, it was just that the state should tax a proportion of them. Whether, if the same amount of protection had been received in respect of constantly changing cars, the same principle would have applied, was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.

FRANKLIN MCNEILL, Samuel L. Rogers, Eugene C. Beddingfield, and the Greensboro Ice and Coal Company, Appts., *v.* SOUTHERN RAILWAY COMPANY. SOUTHERN RAILWAY COMPANY, Appt., *v.* FRANKLIN MCNEILL, Samuel L. Rogers, Eugene C. Beddingfield, and the Greensboro Ice & Coal Company.

(Argued April 2, 3, 1906. Decided May 28, 1906.)

[26 Sup. Ct. Rep. 722.]

Courts—Jurisdiction of Circuit Court—Amount in Dispute.—A controversy between a state corporation commission and a railway company, which involves not only the right to enforce against the railway company the payment of statutory penalties in excess of \$2,000, but also the right of that company to carry on interstate commerce in the state without being subject to orders and directions of the corporation commission, which so directly burdened such commerce as to amount to a regulation thereof, which right is alleged in the bill to be of the necessary jurisdictional value, such allegation being supported by testimony, and found to be the fact, is within the jurisdiction of a Federal circuit court, although a dispute of some \$146 demurrage may have been the origin of the litigation.

State—Immunity from Suit.—A suit to restrain the interference by a state corporation commission with the property and interstate business of a railway company upon the assumed authority of a state statute, which the bill alleges to violate rights of the railway company protected by the Constitution of the United States, is not, in any proper sense, a suit against the state.

Interstate Commerce—State Regulation.*—An order of a state corporation commission compelling a railway company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way to a private siding is an unlawful interference with interstate commerce, whether viewed as an assertion by the commission of its general powers over carriers, or of its power to make the order in a particular case in favor of a given person or corporation.

Appeal and Cross Appeal from the Circuit Court of the United States for the Eastern District of North Carolina to review a decree enjoining the enforcement of any orders of a state corporation commission relating to interstate commerce, and enjoining actions to recover penalties or damages for the violations of such orders. Modified by limiting the decree so as to adjudge the invalidity of the particular order complained of, to restrain actions for the recovery of penalties or damages founded upon the disobedience of such order, and to forbid future interference under like circumstances and conditions with the interstate business of the railway company, and as so modified, affirmed.

See same case below, 134 Fed. 82.

*See preceding case, and foot-note.

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Statement by MR. JUSTICE WHITE:

The Southern Railway Company, a corporation organized under the laws of the state of Virginia, operates, among others, a line of railway passing through Greensboro, North Carolina. At that place the Greensboro Ice & Coal Company, during the times hereafter mentioned, had a coal and wood yard, located some distance from the main track and right of way of the railroad. From this main track, however, there was a private siding or spur track extending across the land of private persons to the establishment of the ice and coal company. In consequence of the views expressed in the opinion it is unnecessary to review the facts as to the construction of this spur track, or to detail the course of dealing between the parties concerning it prior to the origin of this controversy. Certain it is that at one time the railroad delivered cars consigned to the ice and coal company from its main track onto the spur track in question. A dispute arose between the railway company and the ice and coal company concerning demurrage on thirteen cars containing coal and wood consigned to the latter company. In consequence of the refusal of the ice and coal company to pay these charges, the railway, on October 12, 1903, notified the ice and coal company that after October 17, 1903, it would only deliver cars, consigned to the ice and coal company on the public tracks of the railway company at a place known as the team track, set aside for the delivery to the public generally of merchandise of that character. After receiving this notice the ice and coal company ordered four cars of coal from points in the states of Pennsylvania, West Virginia and Tennessee. These cars reached Greensboro between October 18, 1903, and October 22, 1903, were placed upon the team track, and delivery was tendered to the ice and coal company. That company, however, declined to receive or unload the cars elsewhere than on the siding above referred to. An informal complaint on the subject was made by letter on October 20, 1903, to the North Carolina corporation commission, composed of the appellants Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield. After conversations had with officers of the railway company, the commission, on October 31, 1903, made an order requiring the railway company, upon payment of freight charges, to make delivery of the cars beyond its right of way and on the siding referred to. Hearing was had on exceptions filed on behalf of the railway company, and on December 10, 1903, the commission made an order overruling the exceptions. The railway company appealed to the circuit court of Guilford county.

In the meantime, on November 2, 1903, after demurrage or car service charges had attached in respect to the four cars of coal, and to prevent unnecessary interference with its other business, the railway company removed the cars in question from the team track and placed them on a distant siding.

By chapter 164 of the Public Laws of North Carolina for 1899, creating the corporation commission, and by the acts amendatory

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thereof, as contained in chapter 20, revision of 1905, as amended in 1905, it was provided as follows:

"1086. For Violating Rules.—If any railroad Company doing business in this state, by its agents or employees, shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if, after due notice of such violation, given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer, if residing in the state, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by the commission, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of \$500. 1899, chap. 164, § 15.

"1087. Refusing to Obey Orders of Commission.—Any railroad or other corporation which violates any of the provisions of this chapter, or refuses to conform to or obey any rule, order, or regulation of the corporation commission, shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of \$500 for each offense, to be recovered in an action to be instituted in the superior court of Wake county, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter, or continues to refuse to obey or perform any rule, order, or regulation prescribed by the corporation commission, shall be a separate offense. 1899, chap. 164, § 23.

"1091. Violation of Rules, Causing Injury; Damages; Limitation.—If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have the right of action and recovery for such wrong or injury in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that, in case of wilful violation of law, such railroad company shall be liable to exemplary damages; Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. 1899, chap. 164, § 16."

On January 5, 1904, the bill in this case was filed in the circuit court of the United States for the eastern district of North Carolina to perpetually enjoin the bringing of actions by the ice and coal company and by the commission to recover penalties or damages under the authority of the aforesaid statutory provisions, because of the noncompliance of the railway company with the order of the commission. As grounds for the relief prayed it was averred that the railway company had a common defense based upon the commerce clause of the Constitution of the United States, the provisions of the act of Congress to regulate commerce, and the due process clause of the Constitution, and also because the corporation commission was an illegal body, as it was empowered to

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exercise judicial, executive, and legislative functions, contrary to the Constitutions of the state and of the United States. After the filing of answers the cause was referred to a master to report the testimony and findings of fact to the court. The court, concluding that the order of the corporation commission was repugnant to the commerce clause of the Constitution, entered a decree in favor of the railway company, and perpetually enjoined the enforcement of the order of the corporation commission and the bringing of actions to recover penalties or damages for a violation of that order. 134 Fed. 82. The corporation commission and the ice and coal company appealed and the railway company prosecuted a cross appeal upon the ground that the court below erred in not deciding that the corporation commission was an unconstitutional body because of the alleged mixed and peculiar character of the functions conferred upon it by the state statutes.

Messrs. R. H. Battle, E. J. Justice, and Robert D. Gilmer for McNeil et al.

Messrs. Claudian B. Northrop and Fabius H. Busbee for the Southern Railway Company.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

The legal principle which controls the determination of this cause renders it unnecessary to state many of the facts contained in this voluminous record, or to consider and pass upon a number of the legal propositions urged in the cause. But three questions are essential to be passed upon. They are: First. Whether the record discloses that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. Second. Whether, as to the individual defendants below, this cause in fact was a suit against the state of North Carolina. Third. Whether the order and decision of the corporation commission of North Carolina, and the statutes of that state upon which the same was based, were void because in conflict with the commerce clause of the Constitution and the act of Congress to regulate commerce.

1. It was urged in argument on behalf of the commission and the ice and coal company that the extra cost or expense, if any, of placing the four cars of coal on the siding, was the matter in controversy. In the court below it would seem to have been claimed that the \$146 demurrage was the question at issue. However this may be, as said by the trial court, although the demurrage dispute may have been the origin of the litigation, there is involved in the controversy presented by the bill not only the right to enforce against the railway company the payment of statutory penalties much in excess of \$2,000, but also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the corporation commission which so directly burdened such commerce as to amount to a regulation thereof. This latter right

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is alleged in the bill to be of the necessary jurisdictional value, the averment was supported by testimony, and the master and the court below have found such to be the fact. There is no merit in the contention that there is a want of jurisdiction to entertain the writ of error.

2. We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not, in any proper sense, one against the state. *Scott v. Donald*, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; *Fitts v. McGhee*, 172 U. S. 529, 530, 43 L. ed. 541, 19 Sup. Ct. Rep. 269.

3. The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that state, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of. *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

By § 1066 of the revision of 1905, the general powers of the North Carolina corporation commission were thus defined:

"1066. General Powers.—The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations, and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks, and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter and the laws regulating such companies. 1899, chap. 164; 1901, chap. 679."

By § 1100 it was provided as follows:

"1100. Demurrage; Storage; Placing and Loading of Cars.—The commission shall make rules, regulations, and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment. 1903, chap. 342."

Under these circumstances it is undoubted that, by a circular, numbered 36, and dated July 9, 1903, the corporation commission promulgated rules fully regulating the right of railway companies to exact and the amount of charges which might be made for storage, demurrage, etc. And the pleadings make it clear that the order of the corporation commission complained of was not

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made upon the assumption of any supposed contract right which the corporation commission, as a judicial tribunal, was enforcing as between the ice and coal company and the railway company, but was exclusively rested upon the general administrative authority which the corporation commission deemed it had power to exercise in virtue of the rights delegated to it by the statutes of North Carolina, as above stated. Thus, in paragraph 12 of the answer, the corporation commission averred as follows:

"These defendants are advised that the orders made by them, hereinbefore referred to, do not constitute an interference with interstate commerce, as alleged in said paragraph 12 (referring to bill of complaint); nor with the right of the complainant to conduct its business according to its reasonable rules and regulations, except so far as the corporation commission has the right and power to control its rules and regulations by virtue of said act creating the corporation commission, and the amendment thereto, contained in chapter 342, Public Laws 1903, whereby the power is expressly conferred upon the North Carolina corporation commission, by subsection 26, 'to make rules governing railroad companies in the placing of cars for loading and unloading, and in fixing time limit for the delivery of freights after the same have been received by the transportation companies for shipment.' And these defendants further say that, having full power to provide for placing cars for unloading, and in conformity with the rules of the said North Carolina corporation commission, the orders complained of in the bill were in strict conformity to the law, and finally adjudged and made after the complainant company had full opportunity to make defense as to its alleged rights in the premises."

Without at all questioning the right of the state of North Carolina, in the exercise of its police authority, to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the state, or under its authority, which directly burdens interstate commerce, is a regulation of such commerce, and repugnant to the Constitution of the United States. *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, ante, 491, 26 Sup. Ct. Rep. 491; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

Not being called upon to do so, we do not pass upon all the general regulations formulated by the commission on the subject stated, but are clearly of opinion that the court below rightly held that the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void. Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right

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of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case, in favor of a given person or corporation, the order not only was, in its very nature, a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce.

The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of state authority similar in character to the one here involved was passed upon by the circuit court of appeals for the sixth circuit in *Central Stock Yards Co. v. Louisville & N. R. Co.*, 63 L. R. A. 213, 55 C. C. A. 63, 118 Fed. 113. The court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock, moving in the channels of interstate commerce, at a particular place beyond its own line, different from the general place of delivery established by the railway company. In pointing out that, if the legislation in question was entitled to the construction claimed for it, it would amount to a state regulation of interstate commerce, it was aptly and tersely said (p. 219, 63 L. R. A., p. 70, 55 C. C. A. and p. 120, 118 Fed.):

"It is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky Constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do."

As we conclude that the court below rightly decreed that the order complained of was invalid because amounting to an unlawful interference with interstate commerce, we deem it unnecessary to consider the contentions made on the cross appeal of the railway company. And because we confine our decision to the issue which necessarily arises, we do not intimate any opinion upon the question pressed at bar as to whether an order which was solely applicable to purely state business, directing a carrier to deliver property upon a private track beyond the line of the railway company, would be repugnant to the due process clause of the Constitution.

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The final decree which the circuit court entered, and the writ of perpetual injunction issued thereon, were, however, much broader than the necessities of the case required, and should be limited so as to adjudge the invalidity of the order complained of, restrain the institution by the defendant of suits or actions for the recovery of penalties or damages founded upon the disobedience of such order, and forbid future interferences, under like circumstances and conditions, with the interstate commerce business of the railway company. As so modified, the decree below is affirmed.

ALABAMA GREAT SOUTHERN RAILWAY COMPANY *v.* H. C. THOMPSON, Administrator of Florence James, Deceased.

(Argued and submitted November 9, 1905. Decided January 2, 1906.)

[26 Sup. Ct. Rep. 161.]

Removal of Causes—Separable Controversy.*—A case in which plaintiff, in good faith, has elected to sue jointly in tort a foreign corporation and its servants whose misconduct caused the injury complained of, does not—even though such joinder may be improper—present a separable controversy between plaintiff and the corporation, which, under the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), as amended by the acts of March 3, 1887 (24 Stat. at L. 553, chap. 373), and August 13, 1888 (1 U. S. Rev. Stat. Supp. 611, U. S. Comp. Stat. 1901, p. 509), can be removed from a state to a Federal circuit court without regard to the citizenship of the individual defendants.

Argued and submitted November 9, 1905. Decided January 2, 1906.

On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit presenting the question whether master and servant can be joined in action for negligence, and whether such an action presents a separable controversy which justifies removal from a state to a Federal circuit court. Answered by holding that, for the purpose of determining the right of removal, the cause of action must be deemed to be joint.

The facts are stated in the opinion.

Messrs. Edward Colston, Judson Harmon, Edmund F. Trabue, A. W. Goldsmith, and George Hoadly for the railway company.

Messrs. E. S. Daniels, J. V. Williams, and John O. Benson for Thompson, administrator.

MR. JUSTICE DAY delivered the opinion of the court:

This case is here on a certificate from the United States circuit

*See note appended to *Chesapeake & Ohio Ry. Co. v. Dixon* (U. S.), 21 Am. & Eng. R. Cas., N. S., 79.

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court of appeals for the sixth circuit. The certificate states the facts and propounds the questions as follows:

"This was an action in tort, brought by the administrator of Florence James for the negligent killing of the intestate by the defendant railroad company.

"The suit was started in a circuit court of the state of Tennessee, and a declaration was there filed.

"The plaintiff was a citizen of Tennessee.

"The defendants were the Alabama Great Southern Railway Company, a corporation organized under the laws of Alabama, and William H. Mills and Edgar Fuller, both citizens of the state of Tennessee.

"The case was then removed into the court below upon petition of the railroad company alone, upon the ground that a separable controversy, involving more than \$2,000, exclusive of interest and costs, existed between the petitioner and the plaintiff, as to whom diversity of citizenship existed, which could be tried out without the presence of either of the individual codefendants of petitioner.

"A motion to remand to the state court because no removable separable controversy appeared was overruled.

"Thereupon an issue was made and the case heard by court and jury, and a judgment rendered in favor of the plaintiff, and against the railroad company alone.

"From this judgment the railroad company sued out this writ of error.

"Upon the hearing in this court, the court raised the question as to whether the court below had rightfully acquired jurisdiction by the removal proceedings referred to, the removal being grounded only upon the question of separable controversy appearing upon the face of the declaration of the plaintiff at the time of the application for removal.

"That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully, and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was, at the time, under the management and control of the individual defendants, William H. Mills, as conductor, and Edgar Fuller, as engineer.

"Entertaining grave doubt as to whether a joint right of action was stated against the railroad company and the two individual defendants, who were servants of the railroad company, it is ordered that the foregoing statement be certified to the Supreme Court, and that the instruction of that court be requested for the proper decision of the following questions which arise upon the record:

"1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management

and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing, and not charged with any concurrent act of negligence?

"Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds \$2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tort-feasors being identical with that of the plaintiff?"

A question certified must be one the answer to which is to aid the court in determining a case before it. *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. ed. 445, 13 Sup. Ct. Rep. 594. And it is evident that the matter to be determined in the case pending, desiring which the opinion of this court is asked, is the removability of the case brought in the state court against the railroad company and the individual defendants. We shall answer the questions in that view.

The right to remove the controversy is founded upon § 2 of the act of March 3, 1887 [24 Stat. at L. 553, chap. 373], as corrected August 13, 1888 (1 U. S. Rev. Stat. Supp. 611, U. S. Comp. Stat. 1901, p. 509). It is therein provided, among other things, "and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The case was removed upon the theory that it contains a separable controversy between the nonresident railroad company and the plaintiff. The removal act of 1875 [18 Stat. at L. 470, chap. 137], as amended in 1887-88, in the part quoted above as to separable controversies, has been the subject of frequent adjudication in this court. Independent of statute, there is much conflict in the authorities as to whether a corporation whose liability does not arise from an act of concurrence or direction on its part, but solely as a result of the relation of master and servant, may be jointly sued with the servant whose negligent conduct directly caused the injury. In a leading case in this court (*Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67), many of the cases were reviewed by the chief justice who delivered the opinion, and it was shown that in a number of English and American cases it has been held that, as to third persons, the master is responsible for the negligence of his servant in a joint action against both, to recover damages for an injury. In the case of *Warax v. Cincinnati, N. O. & T. P. R. Co.*, 72 Fed. 637, a case which has been much cited and sometimes followed in the Federal courts, it was held that a joint action could not be sustained against master and servant for acts done without the master's concurrence or direction, when his

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responsibility arises wholly from the policy of the law, which requires that he shall be held liable for the acts of those he employs in the prosecution of his business. And it was held that the petition against the engineer and the company presented a case of misjoinder, and could be removed on the application of the non-resident company.

In the case of *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, 265, suit was brought against a railroad company and several of its servants for an injury alleged to have been caused by the joint negligence of all. Mr. Justice Gray, delivering the opinion of the court, said:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Pirie v. Tvedt*, 115 U. S. 41, 43, 29 L. ed. 331, 332, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; *Little v. Giles*, 118 U. S. 596, 600, 601, 30 L. ed. 269-271, 7 Sup. Ct. Rep. 32; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Torrence v. Shedd*, 144 U. S. 527, 530, 36 L. ed. 528, 531, 12 Sup. Ct. Rep. 726; *Connell v. Smiley*, 156 U. S. 335, 340, 39 L. ed. 443, 444, 15 Sup. Ct. Rep. 353."

After thus stating the rule, the justice commented on the *Warax Case*, 72 Fed. 637, as a departure from the former ruling of the circuit court. And while the *Powers Case* was decided on the ground of the right to remove after the local defendants had been dismissed from the action by the plaintiff, it is patent from the language just quoted from the opinion that, conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the nonresident defendant to remove the action to the Federal court.

And in *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 600, 33 L. ed. 474, 475, 10 Sup. Ct. Rep. 203, the same eminent judge, speaking for the court, said:

"It often has been decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the circuit court of the United States, under the act of March 3, 1875, chap. 137, § 2, upon the ground of a separable

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controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. 18 Stat. at L. 471, U. S. Comp. Stat. 1901, p. 508; *Pirie v. Tvedt*, 115 U. S. 41, 29 L. ed. 331,, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 30 L. ed. 1235, 7 Sup. Ct. Rep. 1265.

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court."

The language quoted by Mr. Justice Gray in the *Powers Case* was used by Chief Justice Waite in delivering the opinion of the court in *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735. The Chief Justice said: "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith v. Rines*, 2 Sumn. 348, Fed. Cas. No. 13,100. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way." It is true, as suggested by counsel, that Mr. Justice Gray used the word "seeks instead of "elects;" but we do not perceive that this change deprives the doctrine announced of its force and effect.

The language is used of a action begun in the state court, and it is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer, and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal (*Wilson v. Oswego Twp.*, 151 U. S. 56, 66, 38 L. ed. 70, 75, 14 Sup. Ct. Rep. 259), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal. *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; *Graves v. Corbin*, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21

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Sup. Ct. Rep. 67; *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

In *Whitcomb v. Smithson*, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248, an action was brought by Smithson in a state court of Minnesota against the Chicago Great Western Railway Company and Whitcomb and Morris, receivers of the Wisconsin Central Company, to recover for personal injuries while serving the Chicago Great Western Railway Company as a fireman, as the result of a collision between the locomotive upon which he was at work and one operated by the receivers, who were officers of the Federal court. The railway company answered, and the receivers filed a petition for removal to the United States circuit court. The case was thereafter remanded by the Federal court, that court holding there was no separable controversy, and that the joinder was in good faith. Upon the trial in the state court a verdict was directed by the court in favor of the railway company. Thereupon the receivers asked permission to file a supplemental petition for removal, and upon proffer of a petition and bond the application was denied, and a verdict was returned against the receivers only. Of this feature of the case the Chief Justice, delivering the opinion of the court, said:

"The contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the circuit court. This might have been so if, when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. But that is not this case. The joint liability was insisted on here to the close of the trial, and the nonliability of the railway company was ruled in invitum."

In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right, in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action.

The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.

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In the present case there is nothing in the questions propounded which suggests an attempt to commit a fraud upon the jurisdiction of the Federal courts.

As shown in the opinion of the Chief Justice in the Dixon Case (179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67), the cases are in difference as to whether a common law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleged a joint cause of action.

Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint,—the only pleading filed in the case,—the action is joint. It may be that the state court will hold it not to be so. It may be (which we are not called upon to decide now) that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal court.

As early as 1816 this court, in determining a question of jurisdiction, was governed by the character of the suit brought by the plaintiff. In *New Orleans v. Winter*, 1 Wheat. 91, 4 L. ed. 44, it was held that a citizen of a territory could not sue in a Federal court by joining with himself a citizen of another state. The opinion was delivered by Chief Justice Marshall, who said (p. 95, L. ed. 45): "In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

It is urged with much earnestness by the learned counsel for the company that this view works a surrender of the right of determination of Federal rights in the Federal courts, and deprives nonresident citizens of their rights to appeal to those tribunals. The decision of a state court that such actions as the present might be joint at common law would have no controlling effect in the Federal courts in determining the question in causes properly before them. And the question here is not what is the rule of the Federal courts in similar cases, but is, What controversy

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has Congress made removable in the act under consideration? Congress has not said, whatever it might do, what controversies between citizens of different states shall be removable wherein it is sought, contrary to the law as administered in the Federal courts, to hold the citizens of another state to joint liability in tort with a citizen of the state where the action is brought. The fact that the state court may take a different view from the courts of the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal.

The Federal courts in some states hold a different rule as to the doctrine of fellow-servants from that administered in the state courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the state permits an action to be prosecuted jointly which would be held to be several only in the courts of the United States. The applicant for removal has been duly summoned into a cause in course of prosecution in the state court. All of the defendants not being nonresidents, it can remove only if it presents a separable controversy, which can be wholly determined between itself and the plaintiff. The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. That is joint in character, and there is no attack upon the good faith of the action. In such case we hold that no separable controversy is presented within the meaning of the act of Congress.

We answer the first question: That, for the purpose of determining the right of removal, the cause of action must be deemed to be joint. The views herein expressed lead to an answer to the second question in the negative.

In this opinion we have taken no account of the peculiar statute of Tennessee as to the liability of railroads for injuries to persons on the tracks, as its effect is not presented in the questions propounded, nor is it stated that the injury was received in the state of Tennessee.

GRATIOT STREET WAREHOUSE CO. v. ST. LOUIS, A. & T. H. R. CO.

(Supreme Court of Illinois, April 17, 1906.)

[77 N. E. Rep. 675.]

Appeal—Review—Necessity of Exceptions.—The action of the trial court in marking propositions as “held, but not controlling in this case,” will not be reviewed on appeal, where the party submitting them took no exception to such action.

Same—Waiver of Objections.—Where no error was complained of in the Appellate Court on account of the trial court’s holdings on certain propositions submitted as law, such holdings could not be considered on appeal to the Supreme Court.

Carriers—Carrier as Warehouseman—Goods Awaiting Delivery.*—Where a carrier had no depot or warehouse at the place of destination for the storage of such freight as corn, it had a right to warehouse the corn in cars on side tracks.

Same—Variance.—In an action against a carrier on bills of lading for negligence as a carrier, no recovery could be had on evidence showing negligence as a warehouseman.

Writ of error to Appellate Court, Fourth District.

Action by the Gratiot Street Warehouse Company against the St. Louis, Alton & Terre Haute Railroad Company. A judgment of the Appellate Court affirmed a judgment in favor of defendant, and plaintiff brings error. Affirmed.

This is an action of assumpsit, brought on the 30th day of April, 1901, in the circuit court of St. Clair county by the plaintiff in error against the defendant in error on two bills of lading. The declaration contains two counts. The first count alleges that, on June 22, 1895, plaintiff in error delivered to defendant in error 40,000 pounds of corn in good order, its property, and of the value of \$1,000 to be carried by defendant in error from the city of East St. Louis in said county to Macon, in the state of Georgia, for a certain reward, and there to be delivered in like good order to the Juliette Mills for plaintiff in error; and, thereupon, defendant in error, by the name and style of “St. Louis & Cairo Short Line, June 22, 1895, John P. Gay,” made and delivered to the plaintiff in error its bill of lading, and thereby promised the plaintiff in error, for the consideration mentioned, to safely carry said corn from the place of shipment to the destination stated, and there deliver the same in good order to the said Juliette Mills for the plaintiff in error; but the defendant in error, not regarding its said promise, then and there wrongfully

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to warehousing freight, see footnote appended to *Southern Ry. Co. v. Aldredge & Shelton* (Ala.), 16 R. R. R. 519, 39 Am. & Eng. R. Cas., N. S., 519.

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suffered the said corn to become damp, wet, heated, and so out of order that it was greatly lessened in value, and plaintiff in error was thereby injured, wherefore the plaintiff in error has sustained damages to the extent of \$1,000, etc. The second count avers that, on the 27th day of June, 1895, the plaintiff in error delivered to the defendant in error 352,000 pounds of corn in good order, its property, and of the value of \$15,000 to be safely carried by the defendant in error from the city of East St. Louis to Macon, in the state of Georgia, for a certain reward, and there to be delivered in like good order to the Juliette Mills for plaintiff in error; and thereupon the defendant in error, by the name and style of "St. Louis & Cairo Short Line, June 27, 1895, John P. Gay," made and delivered to the plaintiff in error its bill of lading, and thereby promised the plaintiff in error, for the consideration mentioned, to safely carry said corn from the place of shipment aforesaid to the destination stated, and there deliver the same in good order to the said Juliette Mills for the plaintiff in error; but the defendant in error, not regarding its said promise, then and there wrongfully suffered the said corn to become damp, wet, heated, and so out of order that it was greatly lessened in value, and the plaintiff in error was thereby injured, wherefore, etc. One bill of lading issued June 21 or June 22, 1895, was upon one car of bulk corn, and the other, issued June 27, 1895, was for 10 cars. The cars were to be carried from East St. Louis to Macon, Ga., with the privilege of having the shipment stopped at Juliette Mills for milling; Juliette Mills being a station about 10 miles from Macon. The defendant in error filed the general issue, and two special pleas setting up the five-year limitation statute as a defense. A demurrer to the special pleas was sustained. The defendant gave notice that it would rely specially upon the conditions attached to the bill of lading. A jury was waived, and the court tried the case. The cause was transferred by change of venue from the circuit court of St. Clair county to the city court of East St. Louis. Both parties submitted propositions of law, some of which were held and others refused. In passing upon those asked by plaintiff in error, the court marked them as "held, but not controlling in this case." The issues were found for the defendant in error, and judgment was rendered against plaintiff in error for costs. This judgment has been affirmed by the Appellate Court; and the present appeal is prosecuted from such judgment of affirmance.

Frank K. Ryan, E. P. Johnson and M. Millard, for plaintiff in error.

Kramer & Kramer (John G. Drennan, of counsel), for defendant in error.

MAGRUDER, J. It is conceded that, when the car loads of corn, which were shipped from East St. Louis to Macon, Georgia, arrived at the latter place, the corn was seriously damaged. The defendant in error is sued as a common carrier, and the declara-

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tion is upon the written bills of lading, issued by the defendant in error. As the case was tried before the court without a jury, the questions of fact are settled by the judgment of the trial court in favor of defendant in error, and the judgment of the Appellate Court affirming the judgment of the trial court. The questions of fact were whether the corn was damaged because of leaks in the cars in which it was transported, which let in the water upon the corn, or whether the corn was spoiled by being allowed to remain in the cars on the railroad tracks after their arrival at Juliette Mills, 10 miles from Macon, Ga. The evidence shows that the cars containing the corn arrived at Juliette Mills on different days from the 1st to the 8th or 10th of July, 1895, and that they remained upon the tracks at that station until about the 26th or 29th of July, 1895, when they were carried on to Macon, Ga. It is contended on the part of plaintiff in error that the cars in which the defendant in error transported the corn from East St. Louis were defective because of being leaky, and that the corn was spoiled because of water dripping upon the corn through the leaks in the cars. If this was so, then the defendant in error was liable as a common carrier, because it was its duty to furnish proper cars for the carriage of the corn. On the contrary, it is contended by the defendant in error that the cars were in good repair, and that the corn, when it arrived at Juliette Mills, 10 miles from Macon, Ga., was in good condition, and that the damage was caused by the cars, in which the corn was stored, being allowed to stand on the tracks some three weeks; that is, from the time of their arrival about the 1st of July to the 26th or 29th of July. The testimony tends to show that at the point where the cars were allowed to remain on the tracks at Juliette Mills, the corn in them was liable to become damaged on account of the excessive hot weather in that climate. If the corn was damaged for the reason last stated, then defendant in error was not liable as a common carrier.

First. Upon the trial below, plaintiff in error asked the court to hold five propositions as law in the decision of the case. The court did not mark these propositions either as "held" or as "refused," as required by the statute, but the court marked each proposition as follows: "Held, but not controlling in this case." It is seriously contended by plaintiff in error that the court erred in not marking these propositions as either "held" or "refused," and in marking them as "held, but not controlling in this case." The alleged ground of this contention is that, if the court held a proposition to be the law, it should be controlled by the application of that proposition of law to the facts of the case in making its decision; and that the court could not render a correct judgment without giving such proposition a proper application. In other words, the trial court is said to have erred, because it held that the propositions in question did not control in its decision of the case. Whether or not the trial court erred in this respect is not before us for consideration, because

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plaintiff in error took no exception to the action of the court in thus marking the propositions asked by it. It is insisted by counsel that when the court marked the propositions as held but not as controlling in the case, it did the same thing, practically, as though it rejected them altogether. That is to say, it did the same thing, as though it had marked the propositions "refused." It cannot be denied that if the court had marked the propositions "refused," error could not be assigned on account of such refusal, unless the plaintiff in error took exception to such action of the court. It follows that when the court did what is alleged to have been equivalent to marking the propositions "refused," plaintiff in error, to bring the matter properly before this court, should have taken exceptions to the action of the court below.

Second. The defendant in error asked the court to hold as law in the decision of the case six propositions. Three of these were marked "refused" by the trial court, and three, the fourth, fifth, and sixth, were marked "held" by the trial court. The plaintiff in error here urges that the trial court erred in marking the fourth, fifth, and sixth propositions "held." Defendant in error, by leave of court, has filed a certified copy of the brief and argument of the plaintiff in error in the Appellate Court. An examination of this brief and argument shows that there no error was complained of on account of the holding of the fourth and fifth propositions submitted by the defendant in error as law in the decision of the case. As these propositions numbered 4 and 5 were not complained of in the Appellate Court, the alleged errors based upon them were waived and abandoned in that court, and hence cannot be rightfully urged here.

Third. It follows that the only matter for our consideration is the error assigned by the plaintiff in error on account of the holding as law the sixth proposition, asked by the defendant in error upon the trial below. The sixth proposition is as follows: "That the evidence is not sufficient to sustain a judgment in favor of the plaintiff, and judgment should be had for the defendant." The railroad of the defendant in error ran from East St. Louis to Brookport, Ill., on the Ohio river opposite Paducah, Ky. That is to say, the line of defendant in error ended at Brookport. When the cars arrived at Brookport, or Paducah, in Kentucky, opposite Brookport, they were delivered to another railroad company, to wit, the Paducah, Tennessee & Alabama Railroad Company, a connecting line, and from there were transported over various connecting lines, until they reached the station, called "Juliette Mills," the last connecting railroad being what is called in the testimony the "Southern Railway Company." The testimony tends to show that, when the cars arrived at Paducah, they were inspected and found to be in sound condition. The testimony also tends to show that when the cars arrived at Juliette Mills they were, upon the next day after their arrival, examined by one McGhee, a miller, and that there were no signs in any of the cars of leakage. This miller opened the cars, "and got down

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into them and dug into them with his hands." It thus appears from the testimony that the cars were in good repair when they reached the end of defendant in error's line at Brookport, Ill., or Paducah, Ky., and that they were in good condition upon their arrival at Juliette Mills, 10 miles from Macon, Ga. Evidently, therefore, in making the finding which it did, the trial court was of the opinion that the corn had not been injured on account of the leakage of the cars.

There is also evidence, tending to show that as soon as the cars were examined by the miller, McGhee, upon their arrival at Juliette Mills, the Juliette Mills were notified. It also appears that the railroad company notified McGhee, the miller, of the arrival of the corn within 24 hours after it reached Juliette Mills. The correspondents of the plaintiff in error at Macon, Ga., were Nelms & Jones of that city. It is shown that Jones received notice of the arrival of the cars at Juliette Mills as early as the 10th day of July. The Southern Railway Company had no depot or warehouse at Juliette Mills, and the cars were allowed to stand upon a side track after their examination by McGhee, the miller. Jones did not come to Juliette Mills to examine the corn until July 26, 1895, or some days later than that. At that time the corn was found to be damaged, but it had stood upon the side tracks during the hot weather of July for some three weeks or more after its arrival at Juliette Mills. The evidence tends to show that there was a delivery of the cars to the Juliette Mills about the time of their arrival, but if this was not so, the corn was stored in the cars upon the side track of the Southern Railway Company soon after their arrival.

It is the settled law of this state that carriers by railroad are not bound to deliver the goods carried to the consignee personally, or to give notice of their arrival, to discharge their liability as carriers; and that when the goods have reached their destination, if the consignee is not present to receive them, the carrier may store them safely in a suitable warehouse to await the demand of the consignee. *Chicago & Alton Railroad Co. v. Scott*, 42 Ill. 132; *Gregg v. Illinois Central Railroad Co.*, 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238. When the carrier has brought the goods or the freight to their destination, it has a right to place them in a safe and secure warehouse, and its liability then changes from that of a common carrier to that of a warehouseman. When the carrier thus assumes the new duties of warehouseman, he is liable only for ordinary care and diligence in the preservation of the property. *Chicago & Alton Railroad Co. v. Scott*, *supra*; *Illinois Central Railroad Co. v. Carter*, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527. Where the carrier has no depot or warehouse at the place of destination for the storage of such freight as corn, it may be warehoused in the cars on the side tracks. In *Gregg v. Illinois Central Railroad Co.*, 147 Ill. 555, 35 N. E. 344 (37 Am. St. Rep. 238), it was said: "The law is well settled in this state that the liability of a railroad company, as a common car-

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rier of freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse, or, where the carrier is not required in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber, and the like, by delivering the car in a safe and convenient position for unloading, at the elevator, warehouse, or other place designated by the contract or required in the usual course of business, or, if no place of delivery is thus designated or required, on its side track, in the usual and customary place for unloading by consignees."

There is no doubt, therefore, that upon the arrival of the cars at Juliette Mills, to which point they were consigned by the terms of the bills of lading, the Southern Railway Company, the last connecting line in the transportation of the corn, had a right to store the same in its cars upon its side tracks at Juliette Mills. It follows that if the corn was damaged while being thus stored in cars upon the side tracks between the 1st and 26th of July, 1895, it was not the fault of the defendant in error as a common carrier, but it was either the fault of the defendant in error of the Southern Railway Company as a warehouseman, or of Nelms & Jones, to whom it was alleged that the grain was sold by the plaintiff in error, in not taking away the corn when notified of its arrival. The evidence tended to show and the trial court was justified in finding that the damage or loss occurred upon the tracks of the Southern Railway Company, while the cars were allowed to remain upon their side tracks. This action is not brought against the defendant in error as a warehouseman, nor against the Southern Railway Company as a warehouseman or as common carrier, but, as has already been said, is brought against the defendant in error as a common carrier. The evidence tends to show that the damage to the corn was caused either by the negligence of the defendant in error or of the Southern Railway Company at Juliette Mills, as warehousemen, or by the negligence of Nelms & Jones, the correspondents of plaintiff in error at Macon, Ga., in not unloading the cars soon enough after receiving notice of their arrival. In any event, this action does not lie, under the facts of this case, against the defendant in error as a common carrier.

Accordingly, the judgment of the Appellate Court affirming the judgment of the city court of East St. Louis is affirmed.

Judgment affirmed.

SKIPPER *v.* SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Oct. 8, 1906.)

[55 S. E. Rep. 454.]

Commerce—Interstate Commerce—Regulations.*—Civ. Code, 1902, vol. 1, §§ 1710, 2176, and Laws 1903, Act No. 1 (24 St. at Large, p. 1), requiring a carrier to trace freight shipped over it or a connecting carrier, and making the carrier liable for shipments over it and connecting lines unless it produces a receipt from a connecting carrier, and making a bill of lading prima facie evidence of liability for loss or damage to goods in transit, are not regulations of interstate commerce and unconstitutional.

Appeal from Common Pleas Circuit Court of Lancaster County; Buchanan, Special Judge.

Action by Eliza M. Skipper against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Glenn & McFadden and *T. Y. Williams*, for appellant.

Ernest Moore and *D. R. Williams*, for respondent.

POPE, C. J. The action here was brought against the defendant for \$382.20, as damages for the loss of certain contents from a trunk which was delivered to the defendant for transportation beginning at Chester, S. C., and ending at Englewood, Ill., said trunk containing the baggage belonging to three persons traveling on tickets issued by the defendant from said Chester, S. C., to Englewood, Ill. The answer of the defendant admitted that, on the 28th of July, 1904, the tickets were bought and paid for by the plaintiff over the defendant's line of railway from Chester, S. C., to Atlanta, Ga., and thence over other connecting lines of railway to Englewood, Ill. The defendant also admitted receiving the plaintiff's trunk and the delivery to her of a check therefor, and that the contract was that the defendant would transport said trunk from Chester, S. C., to Atlanta, Ga., and deliver the same to its connecting lines over which the plaintiff was traveling. It further admits that said trunk was in apparent good order. As to what condition it was in when received by the plaintiff at Englewood, Ill., the defendant had no knowledge or information sufficient to form a belief. The defendant further alleges that said trunk was in good order when delivered by it to the Western and Atlantic Railway Company. The case came on for trial before special Judge O. W. Buchanan, at Lancaster, S. C. Both sides introduced testimony. The plaintiff's witnesses testified as

*For the authorities in this series on the subject of state regulation of interstate commerce, see foot-notes appended to *Railroad Com'rs v. Atlantic Coast Line R. Co.* (S. Car.), 20 R. R. R. 745, 43 Am. & Eng. R. Cas., N. S., 745.

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to the number and value of the articles abstracted from the trunk, and that the trunk, when delivered at Englewood, Ill., had the lock broken, and as to the damages which resulted from the loss of such articles. The defendant's witnesses testified to the condition of the contracts evidenced by the tickets issued to the plaintiff by the defendant, and also to correspondence between the attorneys for plaintiff and railway authorities. After the charge of his honor, the jury returned the verdict of \$363.85 in favor of the plaintiff.

After entry of judgment on said verdict, the defendant appealed on 10 grounds, but the appellant confines its argument to certain constitutional questions of law. The points raised by the defendant resolve themselves into an attack upon the constitutionality of sections 1710 and 2176, vol. 1, Code of Laws of 1902, and of act No. 1 of the laws of 1903 of this state (24 St. at Large, p. 1). The contention of defendant is that each of said sections of the Code and said act of 1903 is unconstitutional, null, and void, because when applied to interstate carriers or carriage of baggage such as this, each and all of them impose a burden on interstate commerce, and thus violate the commerce clause of the federal Constitution. The following are copies of the sections and act referred to:

"Section 1710. When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial, delivery or terminal road, upon notice of such loss, damage or destruction being given to it by shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days, after such notice, or to trace such freight or express, and inform the said party so notifying, when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: Provided, that, if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, it shall thereupon be excused from liability under this section."

"Section 2176. In case of the loss or damage to any article or articles delivered to any railroad corporation for transportation over its own and connecting roads, the initial corporation, or corporations first receiving the same, shall, in every case, be liable for such loss or damage, but may discharge itself from such liability by the production of a receipt, in writing, for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation. In which event, the said connecting road or roads shall

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be severally so liable, but may in succession and in like manner discharge themselves respectively therefrom; but if any such corporation shall willfully fail or refuse, upon reasonable demand being made to it by any party interested in the production of such receipt, to produce the same, then it shall not be entitled to claim the benefit of such exemption in any action against the said railroad corporation to render it liable for such loss or damage."

Acts of 1903, 24 St. at Large, pp. 1, 2. "An act to further define connecting lines of common carriers and to fix their liabilities.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, That all common carriers over whose transportation lines, or parts thereof, any freight or baggage or other property received by either of such carriers on a contract for through carriage recognized, acquiesced in or acted upon by such carriers, shall in this state, with the respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from one point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be contract of each of such common carriers; and in any of the courts of this state, any through bill of lading, waybill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall continue prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulation or attempted stipulations to the contrary by such carriers, or either of them.

"Section 2. For any damages for injury, or damage to or loss, or delay of any freight, baggage, or other property sustained anywhere in such through transportation over connecting-lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit."

The subject is not only intensely interesting in its consideration, but it is of great practical importance, for, as was well said by Mr. Justice Woods, in *Willett v. Railroad*, 66 S. C. 477, 479, 45 S. E. 93, "with the immense traffic and the resulting complicated

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business methods of modern American railroads and the connection of these railroads with one another, to impose upon the owner of property passing over connecting lines, the burden of making affirmative proof that the loss occurred on a certain one of these lines, would be practically relieving of liability railroads handling freight as connecting lines, for the owner could rarely make the required proof, and, when he could make it, in most instances the expense of doing so would be greater than the value of the goods." In considering the power of states to legislate upon the question of interstate commerce, the Supreme Court of the United States has held "that an attempt on the part of a state to prohibit a carrier, as to an interstate shipment, from limiting its liability to its own lines would be a regulation of interstate commerce and, therefore void," in construing sections 2317, 2318 of the Georgia Code of 1895 in the case of the Central Georgia R. R. Co. v. Murphey, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444. These two sections of the Georgia Code provide that, if the carrier to which application is made "shall fail to trace said freight and give said information in writing within the time prescribed therein, said carrier shall be liable for the value of the freight lost, damaged, or destroyed in the same manner and to the same amount as if said loss, damage or destruction occurred on its line." Thus it is seen that the judgment against the initial line was rendered absolute and must be, therefore, considered as an infringement by the state of Georgia on the commerce clause of federal Constitution. In the text of this decision, Railroad v. Murphey, *supra*, the United States Supreme Court has distinctly recognized and upheld its two former decisions in the Chicago, Milwaukee & St. Paul Ry. Co. v. Patrick L. Sloan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; and the Richmond Ry. Co. v. R. A. Patterson Tobacco Company, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759. If the two sections of our Code, and the act of 1903, complained of are violative of the Constitution of the United States, of course they are void. The appellant here sought to obtain from the circuit judge a decision of the unconstitutionality of these provisions of our law. The circuit judge refused to hold them unconstitutional, and he now appeals to us to reverse the judge's decision.

The case of Chicago, Milwaukee & St. Paul Ry. Co. v. Patrick L. Sloan, *supra*, was an action to upset a section of the Code of Iowa which provided: "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of persons, which would exist had no contract, receipt, rule or regulation been made or entered into." The jury found a verdict for \$1,000, which was appealed from, but the judgment was affirmed in 95 Iowa, 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. Rep. 430. Justice Grey, in delivering the opinion of the United States Supreme Court on an appeal from the Iowa court, said, page 135 of 169 U. S., page 290 of 18 Sup. Ct.: "By the

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law of this country as declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility of himself or his servants is void as against public policy, as attempting to put off the essential duties that rest upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principles on which the law of common carriers was established to the securing of the utmost care and diligence in the performance of their important duties to the public." Justice Grey further says in his opinion: "The question of the right of a railway corporation to contract for exemption from liability for its own negligence is, indeed, like other questions effecting its liability as a common carrier of goods or passengers, one of those questions, not of merely local law, but of commercial law or of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its Legislature, except so far as restrained by the Constitution of the state or by the Constitution or laws of the United States. * * * Railway corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measure by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate transportation are as much entitled, while within a state, to the protection of that state, as those who travel on domestic transportation. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the law of the state for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, by negligence in transportation, he should inflict injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they had been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as leg-

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isolation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this cause—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods."

So in the case of *Richmond, etc., Co. v. R. A. Patterson Tobacco Co.*, *supra*, Mr. Justice White, as the organ of the court, in speaking of a contract, says on page 14: "Evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown. * * * It is of course, elementary that, where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it, but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contract, when entered into within their borders, may be made, at least until Congress, by general legislation, has undertaken to govern the subject. * * * Of course, in a latitudinarian sense, any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation of the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce." Justice White therein refers to the case we have just quoted from so liberally—*Chicago, Milwaukee & St. Paul Ry. Co. v. Patrick L. Solan*.

It will thus be seen that it is perfectly legitimate for our Legislature, in absence of any national legislation, to make such rules and regulations as it may seem proper, provided it does not destroy or seriously hamper the subjects of interstate commerce. In a body of our statutes it will be observed that great care has been taken to leave the way open for the conduct of interstate commerce. We have only provided rules of evidence, and in doing this the decisions of the United States Supreme Court hold us perfectly justified. We, therefore, overrule all of these objections to the constitutionality of said statutes.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J. I concur. There is a vital distinction between our statute and the Georgia statute, which was condemned in *Central of Georgia R. R. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218,

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49 L. Ed. 444, as an unlawful interference with interstate commerce. The Georgia statute made the initial carrier absolutely liable if it failed within 30 days after application to inform the shipper in writing when, where, how, and by what carrier the freight was lost or damaged together with the names of witnesses to establish such facts, whereas, our statute, section 1710, provides that the carrier shall be excused from liability upon proof that, by the exercise of due diligence, it has been unable to trace the line upon which the loss or damage occurred. The Georgia statute prevented a carrier from availing itself of a valid contract exempting from liability for loss or damage occurring beyond its own line except upon an onerous condition, which in many cases it could not meet; whereas, the South Carolina statute excuses the carrier if the loss did not occur on its own line and it could not after due diligence comply with the requirement of the statute. Section 2176 provides that the carrier may discharge itself from liability by the production of a receipt in writing for the articles from the connecting carrier, and the act of 1903 makes the bill of lading, etc., issued by the carrier for the freight, etc., prima facie evidence of liability for loss or damage to the goods in course of transportation.

The effect of these statutes as applied to interstate shipments is not to regulate interstate commerce, or to burden it, or materially interfere therewith, but to afford a reasonable protection to the shipper, in view of the great difficulty in the way of his proving where the loss occurred, and the relative ease and effectiveness with which the carrier might with reasonable diligence ascertain the facts and communicate to him.

WOODS, J., concurs in both the above opinions.

WHITE RIVER RY. CO. *v.* BATESVILLE & WINERVA TELEPHONE CO.

(Supreme Court of Arkansas, Dec. 17, 1906.)

[98 S. W. Rep. 721.]

Appeal—Review—Exceptions.—An instruction can not be reviewed in the absence of exception to the giving thereof.

Master and Servant—Work of Independent Contractor—Liability of Employer.*—The employer is liable for injury to a third person from work of an independent contractor necessarily resulting from the work contracted for.

Pleading—Amendment—Discretion.—There is no abuse of discretion in refusing an amendment of the answer, all the testimony bearing on the issue sought to be raised thereby having already been introduced without objection, and the amendment being unnecessary.

Railroads—Construction of Road—Liability for Damages.—Under Kirby's Dig. § 6569, providing that a railroad company before constructing part of its road shall make and file in the office of the clerk of the county court a map and profile, it is without authority to clear the way before such filing, and so is liable for damages from its destruction of the line of a telephone company in so clearing the way, though it surveyed its line of road before the telephone line was constructed; the making of the survey giving it no right in the land.

Appeal from Circuit Court, Izard County; John W. Meeks, Judge.

Action by the Batesville & Winerva Telephone Company against the White River Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The complaint charged: That the Batesville & Winerva Telephone Company was a corporation organized under the laws of Arkansas, and owned prior to October, 1901, a telephone line through the counties of Independence, Izard, and Baxter, and that in the early part of 1901 it constructed its telephone line on the north or east bank of White river from Syllamore to Penter's Bluff, Independence county. That in October, November, and December, 1901, the defendant, the White River Railway Company, began the construction of its line of railway from Penter's Bluff to Syllamore. That the railway company constructed its roadbed largely upon the ground where plaintiff's line was located, and, in the construction of its line defendant willfully, intentionally, and unlawfully, cut down, tore down, and dug up a large number of plaintiff's poles, to wit, 560, and tore down and destroyed plaintiff's telephone wires for the greater

*See note at end of case.

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part of the distance between Penter's Bluff and Syllamore. That by reason thereof, plaintiff lost the value of said telephone line, in addition to the expense of erecting and maintaining it. That by reason of such willful, intentional, and unlawful destruction of its plant, plaintiff has been damaged \$3,000 actual damages, and the further sum of \$3,000 double damages, and asks for damages in the sum of \$6,000. The appellant answered, denying each and every allegation of the complaint, and further charged that if plaintiff's telephone line was injured, as alleged, it was the act of one J. R. Reynolds, or his subcontractors; the said Reynolds having the contract, as an independent contractor, for the construction of said railroad, and for whose negligence and torts this defendant is in no wise responsible. After the jury had been impaneled, and after the evidence was all in, the defendant asked leave of the court to amend its answer, so as to conform to new evidence, which amendment was as follows: Defendant, for further answer, says that the defendant surveyed its line of road over the line on which plaintiff built its telephone line, and had staked off its right of way, and was in good faith proceeding to build its line of railroad, before the plaintiff built its telephone line; that, after it had so appropriated said line, the defendant built its telephone lines on the line of the defendant's survey, with full knowledge and notice of the right and claim of defendant, and subject to same. The court refused to allow the amendment to be made, to which all proper exceptions were saved.

The uncontradicted evidence establishes the fact that the damage of which appellee complains, was done by a subcontractor, one J. W. Williamson, who had a contract with appellant's principal contractor, J. H. Reynolds, for the cutting of the right of way and constructing appellant's roadbed along the line where it is alleged that appellee's injury occurred. It was conclusively established that the work which caused the injury and damage to appellee was the work of an independent contractor, over which appellant exercised no control. The proof tended to show that the work of clearing appellant's right of way and building the roadbed necessarily caused the injury to appellee's telephone line of which it here complains. There was some proof of negligence on the part of the contractor in injuring the telephone line. The clerk of the circuit court of IZARD county, where the injury occurred, testified that the map adopted by the White River Railway Company was filed in his office February 8, 1902, and that the profile of the road was filed February 13, 1902. The undisputed evidence showed that appellant's right of way over which appellee's line ran was cut and cleared in 1901. There is no testimony abstracted by appellant or appellee that shows that any work was done on the road covered by appellee's telephone line where the injury to it was done after filing of the map and profile. So far as abstracted, the testimony shows that the work on appellant's right of way that injured appellee occurred before appellant had filed its map and profile. There was some proof tending

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to show that appellee's telephone line was built after appellant's survey was made and the right of way cut. But the preponderance of the evidence was to the contrary.

The court on its own motion, among others, gave the following instructions: "(3) If you find from the evidence that the plaintiff sustained damages to its telephone line substantially as alleged in the complaint, and that the damages so sustained were occasioned by the acts of contractors, who had contracts with the defendant to clear the right of way and construct its road, the defendant is liable for all the damages sustained by plaintiff, which were necessarily done by said contractors in the cutting of the said right of way or construction of said railroad. In other words, if the contractors, in cutting out the right of way and constructing the railroad, were necessarily compelled to destroy the plaintiff's telephone line, then you will find for the plaintiff. (4) I instruct you that an independent contractor is one to whom the owner lets a certain work, to be done by such contractor and delivered to the owner in a finished condition, when the owner reserves no control over the employees of the contractor, or the manner of conducting the work, and if you find from the evidence that the clearing of the right of way and constructing the railroad in controversy, had been let to such independent contractor, by the defendant, and that the damages sustained by the plaintiff, if any, or any part thereof, was the result of the negligence of said contractor or his employees, or subcontractors, then I charge you that the defendant would not be responsible to the plaintiff for such damages, and you will find for the defendant as to all such damages as was the result of such negligence. (5) If you find from the evidence that the plaintiff telephone line was injured by the clearing of the right of way and construction of said railroad, and that the defendant is liable under these instructions for only a part thereof, then I charge you that it is incumbent on the plaintiff to prove, by a preponderance of the evidence, that part of said damages for which defendant is liable, and unless the plaintiff has so proven said damages you will find for the defendant."

The court refused the following request of appellant for instruction, to wit: "(1) If you find from the evidence that the defendant had surveyed its line or any part thereof, before the plaintiff built its telephone line, and that the plaintiff built its telephone line or any part thereof on the survey defendant had made, on which to build its railroad, and the defendant was at the time, in good faith, prosecuting the work of building its line of road, and the plaintiff built its telephone line on the line of said survey, with knowledge of said survey, then I charge you that the plaintiff would not be entitled to recover for such damage to its line, as was the necessary consequence of the clearing of the right of way and construction of said railroad." The court refused to give defendant's instruction No. 1, as above, to which all proper exceptions were saved. A judgment for \$550 was rendered in favor of plaintiff.

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Appellant's motion for new trial contained the general assignments that the verdict was contrary to law, and contrary to the evidence, and the following: "(4) The court erred in refusing to permit defendant to amend its answer to conform to the evidence and the facts proved and admitted in the case. (5) The court erred in giving its instruction No. 3, over defendant's objection. (6) The court erred in refusing to give instruction No. 1 as asked by defendant. (7) The verdict is excessive." The motion was overruled, and this appeal duly prosecuted.

B. S. Johnson, for appellant.

John B. M. Caleb and *Bradshaw, Rhoton & Helm*, for appellee.

Wood, J. (after stating the facts). First. Appellant did not except to the giving of instruction No. 3, which it makes the fifth ground of its assignment of error in the motion for new trial. Appellant, therefore, cannot complain of the giving of this instruction. But, passing that, instructions numbered 3 and 4 declared the law more in appellant's favor than it had the right to ask under the testimony adduced. The proof showed that the work contracted for by appellant with its principal contractor, and which was by him sublet to another, would necessarily result in injury to appellee. Where such is the case, the company contracting for the work to be done is liable, although the work is to be done by an independent contractor. This court, while announcing the doctrine that a railway company is not responsible for the negligent or wrongful acts of an independent contractor, in the construction of its work, has not failed to note also the qualifications to the rule. See *Railway v. Gillihan*, 77 Ark. 553, 92 S. W. 793, and cases cited. In *Martin v. Railway*, 55 Ark. 510, 19 S. W. 314, this court, after announcing the rule, declared also the limitations as follows: "But this rule of immunity from liability is not without its qualifications. If the thing to be done is in itself unlawful, a nuisance per se, or probably cannot be done without necessarily doing damage, the person causing it to be done by another is as much liable for injuries suffered by third persons from the act done, as he would be had he done the act in person." The qualifications are in fact but a part of the rule. See *Railway v. Yonley*, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604, where this court announces the rule in a quotation from Judge Cooley in his work on Torts, at page —; also 3 Elliott on Railroads, §§ 1063, 1064; 1 Jaggard on Torts, 233 et seq. The instructions given were really more favorable to appellant than the facts warranted; for it was undisputed that the work could not be done in the ordinary way without injury to appellee, yet the court submitted to the jury the question of whether or not the work was necessarily injurious to appellee, and as to whether or not the injury was caused by the negligence of the subcontractor or his employees. The appellant, of course, was not liable for any injury caused solely by the negligence of its independent subcontractor or his employees; or for any increased damages which

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their negligence might have occasioned. But it was liable for injuries which must have resulted from the prosecution of the work, although the negligence of the independent subcontractor may have increased the injury and enhanced the damages. The instructions were given in the form most favorable to appellant, ignoring undisputed facts in the record in favor of appellee.

Second. The court did not err in refusing to permit appellant to amend its answer, as set forth in the statement of facts. Such an amendment was a work of supererogation on the part of appellant, for it had already adduced before the jury without objection all the testimony bearing upon the issue sought to be raised by the amendment. The amendment was unnecessary, and the court did not abuse its discretion in refusing it. For, in so doing, no possible prejudice to appellant's cause resulted. Likewise, the court did not err in refusing appellant's request for instruction No. 1. The making of a survey gave appellant no right in the land on which appellee's telephone was located, even if the telephone was built after the survey. It was not shown when appellant acquired its right of way, and unless this was acquired prior to the construction of appellee's telephone, appellant had no exclusive rights in the ground. Moreover, the clearing of appellant's right of way was done in 1901, prior to the filing of its map and profile in the office of the circuit clerk of Izard county. The appellant was therefore without authority to do the clearing under the statute (Kirby's Dig. § 6569), and was liable in damages for the injury caused by its wrongful acts. See authorities, *supra*.

Third. It is conceded by appellee here that the work of which complaint was made was that of an independent contractor. But appellee contends that the work was necessarily injurious to the property of appellee, and that appellant, at the time its right of way was cleared, was engaged in a wrongful act, and was therefore liable to appellee for the injury done its property. As we have shown, that was the theory upon which the cause was submitted to the jury.

There was no prejudicial error in instructions, and the verdict was sustained by the evidence.

Affirmed.

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INDEPENDENT CONTRACTORS—LIABILITY OF EMPLOYERS FOR ACTS OF.

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bursements for the company, he is its agent, and the company is liable for his acts as such. So held in *New Orleans, etc., R. Co. v. Reese*, 61 Miss. 581, 18 Am. & Eng. R. Cas. 110.

3. CONTROL OF WORK.

a. Control of Work Retained.

The most decisive test that can be used for determining whether an employee is a servant, or agent, or an independent contractor is the existence or nonexistence of the right of control in the employer as to the method of doing the work. If the employee retains the right to interfere during the progress of the work, and direct and control the employee as to the method of accomplishing the proposed result, the latter is a servant or agent and not an independent contractor, and the employer is responsible for his acts and conduct while he is acting within the scope of his employment.

United States.—*Atlantic Transport Co. v. Coneys* (C. C. A.), 82 Fed. Rep. 177, 51 U. S. App. 570; *Fuller v. Citizens' Nat. Bank of Galion* (C. C.), 15 Fed. Rep. 875; *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall (U. S.) 649; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. Rep. 175.

Florida.—*St. Johns & Halifax R. Co. v. Shalley*, 33 Fla. 397, 14 So. 390.

Illinois.—*Chicago v. Dermody*, 61 Ill. 431; *Chicago v. Janey*, 60 Ill. 383.

Indiana.—*Dehority v. Whitcomb*, 13 Ind. App. 558, 41 N. E. 1059.

Iowa.—*Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. 253, 39 Am. & Eng. R. Cas., N. S. 253, 103 N. W. 352.

Louisiana.—*Bechnel v. New Orleans, M. & T. R. Co.*, 28 La. Ann. 522; *Camp v. Church Wardens, etc.*, 7 La. Ann. 321; *Faren v. Sellers* 39 La. Ann. 1011, 3 So. 363.

Massachusetts.—*Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287.

Minnesota.—*Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45; *City of St. Paul v. Sitz*, 3 Minn. 297, 74 Am. Dec. 753.

Missouri.—*Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 15 S. W. 1112.

Nebraska.—*Chicago, etc., R. Co. v. Clark*, 26 Neb. 645, 42 N. W. 703.

New York.—*Goldman v. Mason* (City Ct. Brook), 2 N. Y. Supp. 337; *Hart v. Ryan* (N. Y. Sup. Ct.), 6 N. Y. Supp. 921; *Heffernan v. Benkard*, 24 N. Y. Sup'r Ct. Rep. 432; *Ketcham v. Newman*, 3 N. Y. St. Rep. 566.

North Carolina.—*Hunt v. Vanderbilt*, 115 N. Car. 559, 20 S. E. 168.

Ohio.—*Hughes v. Cincinnati & Springfield Ry. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; *City of Cincinnati v. Stone*, 5 Ohio St. 38.

Pennsylvania.—*First Presbyterian Congregation v. Smith*, 163 Pa. St. 561, 30 Atl. 279; *Washington Nat. Gas. Co. v. Wilkinson* (Pa.), 2 Atl. 338.

Texas.—*Texas & Pac. R. Co. v. Dudley*, 1 White (Tex. Civ. App.) 540.

Vermont.—*Bailey v. Troy & Boston R. Co.*, 57 Vt. 252, 52 Am. Rep. 129.

Washington.—*Cooper v. City of Seattle*, 16 Wash. 462, 47 Pac. 887.

Wisconsin.—*Harper v. City of Milwaukee*, 30 Wis. 365.

In *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18, 40 S. W. 399. it is held, that if the company employing a contractor exercises control over the manner in which he is to do the work or over the means by which it is to be done, or if the persons engaged in the work with him are under the control and management of such employer, the contractor and his subordinates are servants of the company.

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But is it not essential that one who engages a contractor to produce a given result should reserve, or should interfere and take, complete or exclusive control over all features of the work, to render him liable as master of the contractor's servants; but the fact that he possesses a limited or partial control will not entail such a liability if the contractor is still left free to exercise his own will generally respecting the methods and means of accomplishing the result. So held in *Kansas City, M. & O. R. Co. v. Loosley* (Kan.), 90 Pac. 990.

Work of Grading Roadbed—Laborers, Subject to Directions of Railroad's Engineer, Were Not Independent Contractors.—In *St. Johns & Halifax R. Co. v. Shalley*, 33 Fla. 387, 14 So. 390, it is held, that where laborers are employed and paid directly by a railroad company for the work of grading its roadbed, such work being taken in sections and paid for by the cubic yard, and such laborers are subject to the directions of the railroad's chief engineer or those of its foreman, in the mode and manner of doing the work, their pay depending upon the work being done according to directions, and they being subject to discharge whenever the work is delayed or imperfectly done, such laborers are not independent contractors; and the railroad is liable for damages to a third person from fire negligently started by such laborers in the performance of the railroad's work.

Failure to Fence Railroad—Operation of Construction Train—Horse Killed.—In *Wyman v. Penobscot & Kennebec R. Co.*, 46 Me. 162, it is held, that where a railroad company commenced the running of cars upon its road before it had erected fences which it was bound to erect, and the plaintiff's horse was killed by its engine, the railroad will not be relieved from liability for damages, by proof that, at the time, certain persons were operating the road, under an agreement with the company that they should receive and retain the railroad earnings, when it was further stipulated that "the trains shall run under the direction of the company, and be under their control."

Contract to Take Charge of Freight Business at Depot under Control of Railroad's Superintendent—Negligence of Trainmen—Personal Injuries.—In *Speed v. Atlantic, etc., R. Co.*, 71 Mo. 303, 2 Am. & Eng. R. Cas. 77, it appeared that a railroad company made a contract with M., by which he was to take entire charge and control of the company's freight business at a certain station, loading and unloading cars, switching them back and forth in the yard, making up freight trains, and doing all the other yard service necessary in the transaction of defendant's freight business; that it was also his duty, when requested, to haul freight from the levee for the railroad company, to prepare, execute and receive all necessary freight bills, to keep all necessary books of account, collect freight money and generally act as and discharge all the duties of a station agent; that, to enable him to discharge his duties, he was to have control over the grounds, yards and buildings, engines and cars of the company at the station; that the railroad was to furnish the necessary engines, and keep them in repair, and supply the fuel, etc., and to employ the engineers and fireman, who were to be under M.'s control, and were to be paid by him; that for his services M. was to be paid monthly at the rate of fifteen cents for each ton of freight received or delivered, and fifty cents for each car hauled from the levee; that the contract was to continue five years; that the business was to be done under the control of the company's superintendent and to his satisfaction, and if not so done defendant could revoke the contract on twenty-four hours notice. It was held, in an action to recover for injuries alleged to have been caused by the negligence of trainmen in the employ of M., that he was not an independent contractor, but stood in the relation of servant to the railroad company.

Negligence in Operating Construction Train—Effect of Right of Contractor to Determine When, Where, and What Supplies Should Be Transported.—In *Burton v. Galveston, etc., Ry. Co.*, 61 Tex. 526,

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21 Am. & Eng. R. Cas. 518, 526, an action for personal injuries inflicted by the alleged negligence of the employees on a railroad train, it appeared that both the train and the road belonged to the company, though the road had not been formally received from the contractors who constructed it; that the engineer, conductor and employees were, when the accident occurred, employed and paid by the company, and could be discharged on complaint of the contractor. It was held, that these facts, unexplained, would establish the liability of the company for the negligence of those in charge of the train; that if the train was run by the railroad company with its own trainmen, for the purpose of transporting construction material for the contractors, the company would be responsible to any one not an employee for injury received by the negligence of those operating the train, even though the contractors had the right to determine when, where, and to what extent supplies should be transported, and to that extent had the control of the company's train and employees.

Control Retained over Only Portion of Work—Injury to Third Person from Doing of Other Portion.—Where an employer retains control over the mode and manner of doing a specified portion of the work only, and an injury results to a third person from the doing of some other portion of the work, the contractor alone is liable. So held in *Hughes v. Cincinnati & Springfield R. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100.

Construction Train and Crew Employed and Paid by Railroad—Contractor without Control—Negligence—Contractor's Employee Injured.—In *Chicago, etc., R. Co. v. Clark*, 26 Neb. 645, 42 N. W. 703, it appeared that a contractor undertook to lay a track upon a newly-constructed railroad; that the railroad company furnished the construction train and the men necessary to operate it, they to be employed and paid by the company, to whom alone they were responsible while running the train, the contractor having no authority to control them in such work. It was held, that if, by the carelessness of those in charge of the train, while passing over the track, an employee of the contractor lawfully on the train was injured, the railroad company would be liable.

Railroad Construction—Cutting Timber under Supervision and Orders.—In *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648, 20 S. E. 718, it is held, that the fact that a railroad company which had let to a contractor the construction of a portion of its road, and the cutting of timber which, under certain restrictions, it had acquired the right to cut, supervised the cutting of the timber and issued orders which the contractor was bound to obey, showed affirmatively a state of subjection on the contractor's part that made him, in law, the servant of the railroad company.

Excavation by Subcontractor—Injury to Adjoining Building—Supervision of Contractor.—In *Hart v. Ryan* (N. Y. Sup. Ct.), 6 N. Y. Supp. 921, it is held, that where an excavation is made for the foundation of a building, and an adjoining wall is injured thereby, the contractor for the construction of the building cannot avoid liability because the excavation was done by a subcontractor, when it appears that the excavation was made under the former's supervision.

Demolition of Building—Direction and Approval of Employer—Negligence—Third Person Injured.—In *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287, it appeared that a contractor entered into a written contract with the trustees of an estate, by which he agreed to take down a certain building, or so much of it as the trustees might request, and which also provided that: "All of said work to be done carefully, and under the direction and subject to the approval of the trustees." It was held, that the trustees were liable for injuries occasioned to a third person by the negligence of the contractor in doing the work named in the contract.

Contract to Repair Wharf and Furnish Materials and Labor—Supervision and Direction of Owner's Engineer.—In *New Orleans, M.*

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& C. R. Co. *v.* Hanning, 15 Wall. (U. S.) 649, it appeared that a contractor agreed with a railroad company to furnish the materials and labor for building a wharf, to put in posts, piles, etc., as the company should require, making an old wharf as good as new, and a new one in the most workmanlike manner, to submit to the supervision and direction of the railroad's engineer, and to do the work to his satisfaction. It was held, that the railroad company had both the general and special control of the work; that the contractor was its agent; and that the railroad was responsible for an injury occurring through the negligence of the contractor or those in his employment.

Repairing Vessels—Firm of Carpenters Employed—Charge by the Hour—Hands Were Servants of Owner.—In *Atlantic Transport Co. v. Coney* (C. C. A.), 82 Fed. Rep. 177, 51 U. S. App. 570, it appeared that a firm of carpenters were employed by a steamship company to make necessary repairs and alterations in their vessels when in port; that they charged for the work by the hour, and for the lumber by the foot, and sent men in charge of a foreman to do the work; and that superintendents and captains of the vessels had the right to direct the manner and extent of repairs and alterations to be made. It was held, that the hands, while so engaged, were the servants of the steamship company, and not of an independent contractor. In this case it is said in the opinion: "The subject matter to which the course of business related—that of a series of minor jobbing repairs—tells with a good deal of clearness what the rights of the respective parties were. The contract of the superintendent (of the company), was not analogous to that of a householder's occasional contract with a tinman to tin a roof, or with a painter to paint a house. It was analogous to that of the owner of a house who customarily calls in the jobbing carpenter whom he is in the habit of employing, and starts him in the work of 'tinkering around, on one thing after another', and doing the various jobs of repairs which time has shown to be necessary. The manner in which the work shall be done, and the dangers to be avoided, as well as the extent to which the work shall be carried on, are under the control and guidance of the owner."

Excavation of Trench Across Road—Failure to Place Road in Safe Condition—Injury to Horseman.—In *Washington Nat. Gas Co. v. Wilkinson* (Pa.), 2 Atl. 338, it appeared that a company contracted for the excavation of a trench across a road, but did not give the contractor full control of the work; and that a horseman was injured by reason of the contractor's failure to place the road in a safe condition. It was held, that the company was responsible for the injury.

Street Improvement—Right to Control Work and Discharge Employees Retained by City.—In *Cooper v. City of Seattle*, 16 Wash. 462, 47 Pac. 887, it is held, that where under its charter a city is given management, control and superintendence of public streets and of making improvements therein, and the management, building and repairing of all sewers, whether such improvements are made by contractors or by the city directly, and under a contract for the improvement of a street, the city retains the right to direct or control the work and to discharge all persons employed thereon who should neglect and refuse to obey the city engineer, the contractor is not an independent one, within the meaning of the rule which exempts a city from liability for an injury caused by negligence in the prosecution of the work, but the city stands in the position of respondent superior.

Construction of Sidewalk under Supervision of Employer—Excavation—Injury to Pedestrian.—In *Fisher v. Rankin* (N. Y. Sup. Ct.), 29 N. Y. Supp. 143, it appeared that plaintiff fell in front of defendant's premises, where the sidewalk had been excavated in order to lay flagstones; that there was evidence that defendant visited the premises every day, saw the men at work, and gave them directions. It

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was held, that this showed prima facie that defendant, and not an independent contractor, was doing the work.

Demolition of Building under Directions of Architect.—In *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363, it is held, that under a contract by which a contractor agrees to demolish a building, which contains a stipulation that "the work of demolition is to be carried out according to the directions of the supervising architect, "whose decisions on all points I agree to accept as final," the contractor was a servant, and not an independent contractor.

Foreman in Iron Mill Employing His Own Assistants and Receiving Stipulated Price Per Ton for Products—Relation between Iron Company and His Assistants.—A person engaged in an iron mill, employing his own assistants and receiving a stipulated price per ton for the products passing through his hands, the factory and all of its machinery being under the control and management of his employer, who furnished a superintendent, master mechanic, boss carpenter and engineer to operate the machinery and keep the building and machinery in repair, is not an independent contractor, but rather a foreman; and the relation of master and servant exists between such assistants employed by him and the proprietor of the factory. So held in *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 803.

Contract to Connect Gas Mains—Control of Gas Retained.—A construction company, employed by a gas company to perform the work of connecting certain gas mains, is not an independent contractor, where the gas company retains control of the gas in the mains during the continuance of the work. So held in *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66.

Contract to Sell Sewing Machines—Commissions on Sales and Collections—Negligence of Canvasser in Driving—Personal Injuries.—In *Singer Mfg. Co. v. Rahn*, 132 U. S. 519, 10 Sup. Ct. Rep. 175, it appeared that a person was employed by a corporation under a written contract to sell sewing machines; that he was to be paid for his services by commissions on sales and collections; that the employer furnished a wagon, and he furnished a horse and harness, to be used exclusively in canvassing for such sales and in the general prosecution of the business; and that he agreed to give his whole time and best energies to the business, and to employ himself under the direction of the company and under such rules and instructions as it should prescribe. It was held, that he was servant of the company, and the latter was responsible to third persons injured by his negligence in driving the horse and wagon in the course of his employment.

Fall through Coal Hole—Negligence of Teamster of Coal Merchant—Possession of Premises.—In *Clapp v. Kemp*, 122 Mass. 481, an action for personal injuries from falling through a coal hole, connected with defendants' store, while a teamster of A was delivering coal for the store, defendants requested the court to instruct the jury that "if they were satisfied that the injury was caused by the carelessness or negligence of the teamster who unloaded the coal, the plaintiff could not recover unless he was the servant of defendants and not the servant of A, who furnished the coal." The judge refused so to rule, but, gave the following instruction: "That the defendants, if they were occupants of the store, would not be liable for the negligence or carelessness of the teamster, if, as the servant of A, he had the exclusive possession or control of the premises so far as was necessary to enable him to deliver the coal. But that if the jury are satisfied that the defendants were at the time occupants of the store, and, as such occupants, had the right to direct or control the mode or manner of said delivery, then the teamster would be the servant of the defendants, so as to render them liable for injuries occasioned by his negligence or carelessness in the delivery of the coal." It was held, that the defendants had no ground of exception.

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Contract to Construct and Operate Logging Railroad in Accordance with Directions—Question for Jury.—In *Cratt v. Albemarle Timber Co.* (N. Car.), 7 R. R. R. 84, 30 Am. & Eng. R. Cas., N. S., 84, 43 S. E. 597, it appeared that plaintiff conveyed to defendant for five years the trees growing on a tract of land, and the right to enter the land and construct and operate such railroads on the land as might be necessary to remove the logs cut. Defendant entered into a contract with other parties by which they agreed to construct and operate the road and cut the timber "in accordance with the directions of" defendant. Evidence was introduced showing that defendant's manager took an active part in the direction of the work, and that it was his duty to see that the requirements of the contract were complied with. Defendant listed for taxation all the property used in the construction and operation of the road. It was held that whether the other parties to the contract were independent contractors or were subject to the control of defendant was for the jury.

Failure to Exercise Right of Control.—And if the employer retains the right to control the work, even if he does not do so, the person contracting to do it is a servant, and not an independent contractor. So held in *Goldman v. Mason* (City Ct. Brook.), 2 N. Y. Supp. 337.

Control Retained over Specified Portion of Work Only.—But where the employer retains control over the mode and manner of doing a specified portion of the work only, and an injury results to a third person from the doing of some other portions of the work, the contractor alone is liable. So held in *Hughes v. Cincinnati & Springfield Ry. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100.

b. Control of Work Relinquished by Employer.

And, of course, it follows that the employer is not liable for damages resulting from the negligence or misfeasance of a person he has contracted with for the performance of lawful work, unless the employer retains control over the manner of executing the work, so that the relation of master and servant, or principal or agent, exists between them.

England.—*Innocent v. Peto*, 4 F. & F. (Eng.) 8; *Murray v. Currie* (Eng. Law Rep.), 6 C. P. 24.

United States.—*Atlantic Transport Co. v. Coneys* (C. C. A.), 82 Fed. Rep. 177, 51 U. S. App. 570; *Fuller v. Citizens' Nat. Bank of Galion* (C. C.), 15 Fed. Rep. 875; *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. (U. S.) 649; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. Rep. 175.

Alabama.—*Massey v. Oates* (Ala.), 39 So. 142.

Arkansas.—*St. Louis, etc., Ry. Co. v. Yonley* (Ark.), 13 S. W. 333.

Iowa.—*Brown v. McLeish*, 71 Iowa 381, 32 N. W. 385; *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776; *Miller v. Minnesota & N. W. Ry. Co.*, 76 Iowa 655, 39 N. W. 188.

Kansas.—*Kansas Cent. Ry. Co. v. Fitzsimmons*, 18 Kan. 34.

Louisiana.—*Gallagher v. Southwestern Exposition Ass'n*, 28 La. Ann. 946; *Peyton v. Richards*, 11 La. Ann. 62; *Riley v. State Line Steamship Co.*, 29 La. Ann. 791; *Sweeny v. Murphy*, 32 La. Ann. 628; *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363.

Maine.—*Eaton v. European & N. A. Ry. Co.*, 59 Me. 520; *State v. Trask*, 72 Me. 455; *Wyman v. Penobscot & Kennebec R. Co.*, 46 Me. 162.

Maryland.—*City & S. Ry. Co. v. Moores*, 80 Md. 348, 30 Atl. 643; *Deford v. State*, 30 Md. 179.

Massachusetts.—*Brackett v. Lubke*, 86 Mass. 138; *Forsyth v. Hooper*, 93 Mass. 419; *Hilliard v. Richardson*, 3 Gray (Mass.) 349; 63 Am. Dec. 143; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287.

Michigan.—*Deforrest v. Wright*, 2 Mich. 368; *Reier v. Detroit Steel & Spring Works*, 109 Mich. 244, 67 N. W. 120; *Riedel v. Moran-Fitzsimmons Co.*, 103 Mich. 262, 61 N. W. 509.

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Minnesota.—City of St. Paul *v.* Seitz, 3 Minn. 297; Gahagan *v.* Aermotor Co., 67 Minn. 252, 69 N. W. 914; Rait *v.* New England Furniture, etc., Co., 66 Minn. 76, 68 N. W. 729; Waters *v.* Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52.

Missouri.—Fell *v.* Coal Mining Co., 23 Mo. App. 216; Long *v.* Moon, 107 Mo. 334, 17 S. W. 810; Morgan *v.* Bowman, 22 Mo. 538; Speed *v.* Atlantic, etc., R. Co., 71 Mo. 303, 2 Am. & Eng. R. Cas. 77.

Nebraska.—Chicago, etc., R. Co. *v.* Clark, 26 Neb. 645, 42 N. W. 703; Hitte *v.* Republican Valley R. Co., 10 Neb. 620, 29 Am. & Eng. R. Cas. 566; Meyer *v.* Midland Pac. R. Co., 2 Neb. 319.

New Hampshire.—Carter *v.* Berlin Mills, 58 N. H. 52, 42 Am. Rep. 572; Knowlton *v.* Hoyt, 67 N. H. 155, 30 Atl. 346; Manchester *v.* Warren, 67 N. H. 482, 32 Atl. 763.

New Jersey.—Conway *v.* Furst, 57 N. J. L. 645, 32 Atl. 380.

New York.—Benedict *v.* Martin, 36 Barb. (N. Y. Sup. Ct.) 285; Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017; Charlock *v.* Freeland, 125 N. Y. 357, 26 N. E. 262; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Goudier *v.* Cormack, 2 E. D. Smith 254; Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. S. 1032; Herrington *v.* Village of Lansingburgh, 110 N. Y. 145, 17 N. E. 728; Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755; Kelly *v.* City of New York, 11 N. Y. 432; McCafferty *v.* Duyvil, 61 N. Y. 178; Murphy *v.* Altman, 28 N. Y. App. Div. 472, 51 N. J. S. 106; O'Rourke *v.* Hart, 7 Bosw. (N. Y. Sup'r Ct.) 511; Potter *v.* Seymour, 4 Bosw. (N. Y. Sup'r Ct.) 140; Schular *v.* Hudson River R. Co., 38 Barb. (N. Y.) 653; Slater *v.* Mersereau, 64 N. Y. 138; Town of Pierrepont *v.* Loveless, 72 N. Y. 211; Vogel *v.* Mayor, etc., of New York, 92 N. Y. 10, 44 Am. Rep. 349; Wiener *v.* Hammell (City Ct. N. Y.), 14 N. Y. Supp. 365.

Ohio.—City of Cincinnati *v.* Stone, 5 Ohio St. 38; Clark *v.* Fry, 8 Ohio St. 358; Hughes *v.* Cincinnati & Springfield Ry. Co., 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; Southern Ohio R. Co. *v.* Morey, 47 Ohio St. 207.

Pennsylvania.—City of Erie *v.* Caulkins, 85 Pa. St. 247, 27 Am. Rep. 642; Eby *v.* Lebanon County, 166 Pa. St. 632, 31 Atl. 332; Edmundson *v.* Pittsburg, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404, 23 Am. & Eng. R. Cas. 423; First Presbyterian Congregation *v.* Smith, 163 Pa. St. 561, 30 Atl. 279; Jessup *v.* Sloneker, 142 Pa. St. 527, 21 Atl. 988; Mansfield Coal & Coke Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 42; Wray *v.* Evans, 80 Pa. St. 102.

Rhode Island.—Read *v.* East Providence Fire District, 20 R. I. 574, 40 Atl. 760; Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 4 Am. & Eng. R. Cas., N. S., 318.

Tennessee.—Knoxville Iron Co. *v.* Dobson, 75 Tenn. 367; Powell *v.* Virginia Construction Co., 88 Tenn. 692, 693, 13 S. W. 691.

Texas.—Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Houston, etc., R. Co. *v.* Van Bayless, 1 White (Tex. Civ. App.) 500; Wallace *v.* Southern Cotton Oil Co., 91 Tex. 18, 40 S. W. 399.

Vermont.—Bailey *v.* Troy & Boston R. Co., 57 Vt. 252, 52 Am. Rep. 129; Pawlet *v.* Rutland, etc., R. Co., 28 Vt. 297.

Virginia.—Emmerson *v.* Fay, 94 Va. 60, 26 S. E. 386.

Washington.—City of Seattle *v.* Buzby, 2 Wash. Terr. 25, 3 Pac. 180.

In *Pawlet v. Rutland, etc., R. Co.*, 28 Vt. 297, it is held, that the liability of a master for the acts of his servants grows out of and is measured by the control of the former over the latter, and for the want of such control, the principal will not ordinarily be liable for the acts or neglect of the employees of a subcontractor under a contractor employed by him to do a specified work.

In *Gallagher v. Southwestern Exposition Assn.*, 28 La. Ann. 946, it is held, that where a party lets a job of work to a competent and suitable contractor, and does not retain or exercise any control or supervision over the work, he can not be held liable to an employee

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of the contractor for any injury sustained by the employee while engaged on the work, on account of the fault of the contractor.

Where one carries on an independent employment in pursuance of a contract, by which he has entire control of the work and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment. So held in *Smith v. Belshaw*, 89 Cal. 427, 26 Pac. 834.

Where a person employed is in the exercise of an independent and distinct employment, and not under the immediate control or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former. So held in *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329.

In *Deford v. State*, 30 Md. 179, it is held, that the rule "respondeat superior," does not apply where the party employed to do the work, in the course of which the injury occurs, is a contractor pursuing an independent employment, and, by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done.

It is the settled law of this state that an employer is not liable for the negligent acts of a contractor or his servants where the contractor carries on an independent business, and, in doing his work, does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on. So held in *Leavitt v. Bangor & A. R. Co. (Me.)*, 7 Am. & Eng. R. Cas., N. S. 354.

Injury to Person Traveling on Construction Train—Pass Furnished by Contractor, and Engineers Subject to His Orders.—In *Scarborough v. Alabama Mid. R. Co.*, 94 Ala. 497, 10 So. 316, it is held, that an action does not lie against a railroad company, at the suit of a person traveling on a construction train, for damages on account of personal injuries caused by a collision with another train, when it appears that the plaintiff was traveling on a pass furnished by the contractor for the construction of part of the road, for which he had been working, and that the injuries occurred on a part of the road which had never been completed and accepted, though trains were running on it furnished by the railroad company for use by the construction company and contractors, with engineers subject entirely to their orders.

Contract to Clear Railroad Right of Way of Rubbish at Agreed Price Per Mile.—In *St. Louis, etc., R. Co. v. Yonley (Ark.)*, 13 S. W. 333, it is held, that a person employed by a railroad company to clear off and burn the rubbish from its right of way at so much per mile, who hires, pays, and controls his own help, is not a servant of the railroad, but an independent contractor.

Construction of Street Railway—Unnecessarily Laying Down Loose Rails—Injury to User of Street.—Where a street railway company, having authority to construct a railway in a street, does the work by an independent contractor, and an injury to a person passing along the street is caused by the negligence of a servant of the contractor, which negligence consisted in unnecessarily and improperly laying down loose iron rails in advance of the workmen engaged in constructing the track, the railroad is not liable for the injury, it not having reserved any control over the contractor in executing the work. So held in *Fulton, etc., R. Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828.

Contract to Pump Water Out of Excavation Made by Railroad—Negligence in Operating Engine—Team Frightened.—A railroad company is not liable for an injury to a traveler on a highway, through the fright of his horse, caused by the negligence of the owner of a portable steam engine in operating it near the highway, under a contract with the railroad to pump water out of the way of

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an excavation which is being constructed by the latter, where he has exclusive control of the engine and of the manner of using it. So held in *Wabash, St. L. & Pac., R. Co. v. Farver*, 111 Ind. 195, 31 Am. & Eng. R. Cas. 134, 12 N. E. 296.

Railroad in Possession of Contractor—Negligent Operation.—When a railroad is being constructed, and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company at the time the injuries complained of are committed has no control thereof, the company is not liable for the damages resulting from the operation of the railroad. So held in *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34.

Railroad under Control of Construction Company—Defective Track—Negligence of Employee in Charge of Construction Train.—In *St. Louis, etc., R. Co. v. Willis*, 38 Kan. 330, 33 Am. & Eng. R. Cas. 397, 16 Pac. 728, it is held, that where a railroad company contracts with a construction company to survey and locate its line, procure its right of way, construct its road and appurtenances, and to equip it with engines and cars, in accordance with certain specifications, such provisions of the contract make the construction company an independent contractor, so that the railroad company is not liable for injuries occasioned by a defective track, or the negligence of employees on a train loaded with construction materials, on a part of the line constructed by the construction company, and remaining under its control, and not inspected, accepted, or operated by the railroad company.

Construction of Railroad—Tote Road Cut Through Plaintiff's Premises by Subcontractor—Fires.—In *Eaton v. European & N. A. R. Co.*, 59 Me. 520, it appeared that a railroad company engaged a contractor to construct "under the general supervision of the chief engineer of the company" a specific portion of its railroad, located across the plaintiff's timber track; and that the subcontractor and his employees cut a tote road through plaintiff's premises outside the railroad right of way, and set fires, which, through their negligence, spread and burnt plaintiff's timber. It was held, that the company, not having directed the acts complained of, and having no such control over the persons committing them as to direct or remove them, was not liable for the damages occasioned thereby.

Contract to Build Portion of Railroad—Negligence in Running Construction Train.—In *Hitte v. Republican Valley R. Co.*, 10 Neb. 620, 29 Am. & Eng. R. Cas. 566, it is held, that a railroad company which has entered into an agreement with a contractor to build a portion of its railroad, and whose locomotives and cars, used in such construction, are run exclusively under the direction and control of the contractor, will not be liable for damages occasioned prior to the completion of the road, by reason of the negligence of the persons running such locomotives.

Contract to Construct Railroad—Blasting—Rocks Thrown upon Adjoining Land—Injuries to Third Person.—A railroad company which has let by contract the entire work of constructing its road, and has no control over those employed in the work, is not liable for injuries to a third person caused by negligence in doing the work of blasting, so as to throw rocks upon adjoining land. So held in *McCafferty v. Duyvil*, 61 N. Y. 178.

Construction Work—Contract to Draw Railroad's Cars—Horses and Drivers Furnished by Contractor.—In *Schular v. Hudson River R. Co.*, 38 Barb. (N. Y.) 653, it was held, that the defendant railroad company was not liable for the negligent acts of the employees of contractors, performed while the contractors were carrying out an absolute contract with the railroad to draw its cars over a certain portion of the road, to furnish the horses and drivers for such purpose, and to assume entire control of the work.

Contract to Construct Railroad—Stipulated Compensation.—In *Edmundson v. Pittsburg, etc., R. Co.*, 111 Pa. St. 316, 2 Atl. 404, 23

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Am. & Eng. R. Cas. 423, it is held, that where a railroad company contracts for the construction of its road with one who agrees to do all the work for a stipulated price, retaining to itself no direction or authority as to the means to be employed by the contractor to perform the work, the company is not liable for damages resulting from his negligence, for the contractor is exercising an independent employment.

Contract to Construct Street Railway—Rope Across Highway—Injury to Traveler.—In *Sanford v. Pawtucket St. R. Co.*, 19 R. I. 537, 35 Atl. 67, 4 Am. & Eng. R. Cas., N. S., 518, it appeared that the charter of a street railway company imposed upon it the duty of putting the streets and highways in which it should lay any rails, in as good condition as they were and of keeping in repair such portions of the streets as should be occupied by its tracks, and made it liable for any loss or injury that any person should sustain by reason of any negligence or misconduct of its agents or servants in the management, construction or use of said tracks or streets. It was held, that where the corporation had contracted with an independent contractor, not residing in this state, for the construction of its road, over whom and over whose agents and servants it had no control, the corporation was not liable for an injury sustained by a traveler on a public highway in consequence of the negligence of the contractor or his workmen in erecting and maintaining a rope or wire across the highway in the course of the work of construction.

Negligent Operation of Construction Train.—A railroad company is not liable for damages resulting from the negligent management of one of its trains used and controlled by construction contractors, for construction purposes, on a portion of its road built under the construction contract and not yet turned over to the railroad company, so held in *Cunningham v. International R. Co.*, 51 Tex. 503, 32 Am. Rep. 632.

In *Meyer v. Midland Pac. R. Co.*, 2 Neb. 319, it is held, that a railroad company is not liable for an injury sustained while its road is being built and operated by contractors who own the cars and engine by which the injury is committed and of which the company had, at the time, no control.

Accident to Construction Train.—In *Union Pac. R. Co. v. Hause*, 1 Wyo. Terr. 27, it is held, that a railroad company is not responsible in damages to a person injured by an accident to a train passing over a portion of the road not completed, when the train is solely under the charge of the contractors building the road, and receiving all the profits thereof, that portion of the road still being unaccepted by the company.

Railroad Construction Work—Control—Burden of Proof.—In an action against a railroad company for damage done to land by one who built defendant's railroad under a contract with defendant across plaintiff's land, it is incumbent on the company to show that it exercised no control and was not interested except in results. So held in *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648, 20 S. E. 718.

Construction of Cement Sidewalk—Defective Temporary Board Walk—Injury to Pedestrian.—In *Massey v. Oates* (Ala.), 39 So. 142, it appeared that the owner of a business house abutting on a street contracted with a competent man for a cement pavement on the sidewalk in front of the house; that the contractor was to furnish the material and labor and to receive an agreed compensation per yard of pavement; that the work was to be promptly done, and in such a way as to cause the least inconvenience to others; that the owner reserved no control over the contractor in respect to the work, and did not direct him in any way during its progress; that, in order to obstruct the sidewalk as little as possible, the contractor, after laying the pavement, constructed over it a plank walk or floor to be used while the pavement was hardening; and that this plank walk

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was defectively constructed, and a pedestrian, while attempting to use it as a sidewalk, fell and was injured. It was held, that the contractor was an independent contractor; and that the injury was not the result of any inherent danger attendant upon the construction of the walk, but was the result of negligence on the contractor's part; and was not contemplated by the contract itself; and, therefore, the owner of the building was not liable for the injury.

Contract with Ore Digger—Employment of Assistants—Compensation.—An ore digger who employs and pays his own assistants, and the details of whose work are subject to his own exclusive control and management, and who is paid by the mine owner a specified sum per car for ore, is not a servant of the mine owner, but an independent contractor. So held in *Harris v. McNamara*, 97 Ala. 181, 12 So. 103.

Excavation for Building Foundation—Contract Silent as to Mode of Doing Work.—Where a coterminous landowner contracts with one to excavate a lot for the purpose of erecting a building, and the contract is silent as to the mode of doing the work, he is not liable for damages occasioned by the acts of such person or his servants. So held in *Aston v. Nolan*, 63 Cal. 269.

Dam Destroyed before Completion—Store Flooded.—In *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345, it appeared that parties employed architects, reputed to be skilled in their profession, to construct, at a designated point on a creek, a dam or embankment of certain specified dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time; and that before the embankment was completed, it was broken by a sudden freshet, and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs with their stock or merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. It was held, that contractors alone were liable, as they were independent contractors.

Street Grading—City Required to Contract with Lowest Bidder.—When the law compels a city to give out a contract for grading a street to the lowest bidder, it takes away from the city the responsibility arising from the acts of the person taking the contract. So held in *James v. City of San Francisco*, 6 Cal. 528, 65 Am. Dec. 526.

Excavation on Private Property—Absence of Guards—Injury to Passer-By.—In *Kepperly v. Ramsden*, 83 Ill. 354, it is held, that where a contractor is in possession of that part of the premises upon which an excavation is to be made, with the exclusive control of the work, it becomes an incident to his undertaking to so do the work that it will be reasonably safe to passers-by; and that duty includes the making of necessary safeguards; and in such case the owner of the premises is not responsible for his neglect of duty.

Building Repairs—Injury to Third Person.—A contractor having entire control of a building on which he is making repairs, using his own means and methods for doing the work on a previously adopted plan, is not a servant of the owner of the building, and the latter is not liable to third persons for his negligence. So held in *Jefferson v. Jameson*, 165 Ill. 138, 46 N. E. 272.

Construction of Building—Authority to Contract for Material and Labor, Subject to Approval—Agreement to Devote Whole Time.—One who acts under a contract with a corporation which authorized him to contract for material and labor in his own name, subject to approval, who is employed "in the construction" of a building, is to give his whole time to its supervision, to report the cost, and who is to be paid a certain sum "in full for his services in looking after the execution of said contract and superintending construction of the building," is a servant of the company and not an independent contractor. So held in *Hughbanks v. The Boston Investment Co.*, 92 Iowa 267, 60 N. W. 640.

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Contract to Load Vessel—Negligence of Stevedore's Laborers.—In *Sweeny v. Murphy*, 32 La. Ann. 628, it is held, that where the master and owners of a ship have contracted with a competent stevedore to load her, and did not control or direct, in any way, the laborers employed in the loading, they are not responsible for injuries resulting from the negligence of such laborers.

Street Grading Contract—Selection of Workmen.—In *Kelly v. City of New York*, 11 N. Y. 432, it is held, that a municipal corporation that has contracted for the grading of a street is not responsible for an injury resulting from the negligence of the workmen employed by the contractor, though the contract provided that the work shall be done under the directions of an officer of the corporation. In this case it is said in the opinion: "The clause (of the contract) in question clearly gave to the corporation (the city) no power to control the contractor in the choice of his servants; that he might make his own selection of workmen will not be denied. This right of selection lies at the foundation of the responsibility of a master or principal, for the acts of his servant or agent."

Contract to Clear Land—Fire Spreading to Adjoining Land.—In *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, it appeared that defendant leased to H. certain lands to work on shares, agreeing to pay him a specified sum per acre for clearing so much of the land as he should choose to clear; and that, in the work of clearing the land, H. set fire to some wood and brush, and, as was alleged, the fire spread to plaintiff's adjoining lands and burned buildings thereon. It was held, that, in clearing the land, H. was an independent contractor, for whose negligence in doing the work defendant was not liable.

Contract to Set Marble for Front of Building—Injury to Third Person.—In *Potter v. Seymour*, 4 Bosw. (N. Y. Sup'r Ct.) 140, it is held, that where an owner, when about to erect a building on his lot, contracts with a person to furnish and set the marble for the front thereof, agreeably to certain specifications, and for a definite sum agreed to be paid therefor; and the owner neither interferes with the work nor reserves any right of interference or direction, he is not liable to a third person for an injury sustained by the latter in consequence of the negligence of the contractor's employees engaged in setting the marble.

Obstruction in Street—Injury to Passer-By—Liability of City.—In *City of Erie v. Caulkins*, 85 Pa. St. 247, 27 Am. Rep. 642, it is held, that where an injury occurs to a passer-by through an obstruction in a public street, placed there by a contractor exercising an independent employment, the city is not responsible therefor unless by the terms of her contract the contractor is under her management.

Coal Hole in Pavement Left Open by Master Rigger Employed by Owner of Premises—Injury to Third Person.—In *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699, it appeared that the owner of a sugar refinery employed a master rigger to remove certain heavy machinery for use therein from a railroad train to their place in the refinery; that in the prosecution of the work he opened a coal hole in the pavement in front of the refinery into which to place a beam to secure a purchase for his tackling; that after such purpose was accomplished the beam was removed and the hole remained open a few moments, during which time a boy walked into it; that the owner of the refinery did not interfere in any manner with the work, and the entire direction of it was under the control of the rigger, who was paid by the day. It was held, that the owner of the refinery was not liable for the boy's injury.

Contract to Dig Trenches in Streets for Gas Company—Fall of Third Person into Trench Dug by Employers of Subcontractor.—In *Wray v. Evans*, 80 Pa. St. 102, it appeared that W. contracted with a gas company to dig trenches in streets, lay gas pipes, etc., to the satisfaction of the company's engineer, who was to have the right to sus-

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pend the work; that W. was to bear all losses, etc., which happen to any person; that W. sublet to D. to perform all the work for which W. had contracted, to the satisfaction of the company's engineer, to be suspended as the engineer might direct; that D. was to bear all losses, by reason of carrying out the work, through negligence, etc.; that if D. neglected to perform the work to the satisfaction of the engineer, W., on two days' notice, might declare the contract void; and that a trench was made under the contracts by D., who employed the hands and supervised them, W. having no control over them, and plaintiff fell into the trench and was injured. It was held, that W. was not liable to plaintiff for the injury.

Unloading Cargo of Corn—Injury to City Corn Meter.—In *Innocent v. Peto*, 4 F. & F. (Eng.) 8, it appeared that the unloading of a cargo of corn for which the defendants were paid by the owner, was done by men engaged and paid by a gauger or contractor, who had exclusive control over them, and with whom the defendants contracted for the work. It was held, that defendants were not liable for an injury sustained by a corn meter in the service of the city through the negligence of such workmen.

c. Assumption of Control by Employer.

But the contract relation of employer and independent contractor may be destroyed and that of master and servant, or principal and agent, be created by the conduct of the employer in assuming control of the work, by interfering with it and giving directions as to the methods to be pursued in its performance. *Atlanta & Florida R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277; *Wilson v. White*, 71 Ga. 506; *Heffernan v. Benkard*, 24 N. Y. Sup'r Ct. Rep. 432; *Ketcham v. Newman*, 3 N. Y. St. Rep. 566; *Eby v. Lebanon County*, 166 Pa. St. 632, 31 Atl. 332; *Read v. East Providence Fire District*, 20 R. I. 574, 40 Atl. 760.

There are certain exceptions to the rule exempting an employer from liability for the acts of an independent contractor: Where the employer personally interferes with the work and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance, and where an employer is bound by statute to do a thing efficiently and an injury results from its inefficiency. So held in *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957.

If an employer in fact assumes the relation of master to the servants of one whom he has engaged to produce a given result, the duties and responsibilities which the law imposes upon such a relation attach. So held in *Kansas City, M. & O. R. Co. v. Loosley* (Kan.), 90 Pac. 990.

Construction of Building—Directions Given by Owner—Third Persons Injured.—In *Heffernan v. Benkard*, 24 N. Y. Sup'r Ct. Rep. 432, it is held, that any interference, assumption of control, or directions given by the owner of buildings, being erected for him by contractors under a special agreement giving the latter the control of the work, renders him personally liable for injuries sustained by third persons by the negligent conduct of such contractors, in work done in obedience to such directions.

Blasting—Railroad in Actual Control.—Even though it appears from the contract, by which a railroad company employed a company to do some blasting at the top of a cut at the end of a tunnel, that the latter company was an independent contractor, yet, if the railroad was in fact controlling the work which resulted in injury to a third party as he walked out of the cut, it is liable for the injury if there was such negligence as to render it in any manner responsible. So held in *Louisville & N. R. Co. v. Tow*, 21 Am. & Eng. R. Cas., N. S., 441, 63 S. W. 27, 23 Ky. L. Rep. 408.

Railroad Construction—General Management Assumed by Railroad.—In *Savannah, etc., R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82.

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it is held, that if a railroad company employed another corporation to construct for it a railroad under a contract by the terms of which, if strictly carried out, the corporation would be an independent contractor, but afterwards the parties abandoned the contract, and the railroad took charge of and supervised the work, gave directions as to how the roadbed should be constructed, and assumed general management and control of the enterprise, the railroad company was not relieved from liability for injuries caused by neglect or improper construction, but was primarily responsible.

d. Right to Supervise and Approve.

The fact that the employer reserves the right to supervise the work, to see that it is properly done and in accordance with the contract, does not give him control of the work, so that he becomes responsible for the acts of the contractor.

United States.—*Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. Rep. 615.

Alabama.—*Chattahoochee, etc., R. Co. v. Behrman*, 136 Ala. 508, 35 So. 132, 7 R. R. R. 920, 30 Am. & Eng. R. Cas., N. S., 920.

Arkansas.—*St. Louis, etc., R. Co. v. Gillihan (Ark.)*, 20 R. R. R. 624, 43 Am. & Eng. R. Cas., N. S., 624, 92 S. W. 793.

Georgia.—*Atlantic, etc., R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277; *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Wilson v. White*, 71 Ga. 506.

Illinois.—*Pioneer Construction Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17.

Indiana.—*New Albany Forge & Rolling Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294; *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747.

Iowa.—*Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776.

Kentucky.—*Robinson v. Webb*, 74 Ky. 464.

Maine.—*Tibbetts v. Knox & L. R. Co.*, 62 Me. 437.

Minnesota.—*City of St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753.

Missouri.—*Blumb v. City of Kansas*, 84 Mo. 112, 54 Am. Rep. 87; *Burns v. McDonald*, 57 Mo. App. 599; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Larson v. Metropolitan Street R. Co.*, 110 Mo. 234, 19 S. W. 416; *McKinley v. Chicago, etc., R. Co.*, 40 Mo. App. 450.

Nebraska.—*Omaha & Bridge Terminal Co. v. Hargadine (Neb.)*, 13 R. R. R. 827, 36 Am. Rep. R. Cas., N. S., 827, 98 N. W. 1071.

New York.—*Gardner v. Bennett*, 33 N. Y. Sup'r Ct. 197; *Goudier v. Cormack*, 2 E. D. Smith 254; *Martin v. Tribune Ass'n*, 30 Hun (N. Y. Sup. Ct.) 391; *Pack v. City of New York*, 8 N. Y. 221.

Ohio.—*Hughes v. Cincinnati & Springfield R. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100.

Pennsylvania.—*First Presbyterian Congregation v. Smith*, 163 Pa. St. 561, 30 Atl. 279; *Smith v. Simmons*, 103 Pa. St. 32, 49 Am. Rep. 113; *Thomas v. Altoona, etc., R. Co.*, 191 Pa. St. 361, 43 Atl. 215; *Welsh v. Lehigh & W. Coal Co. (Pa.)*, 5 Atl. 48.

Tennessee.—*Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691; *Knoxville Iron Co. v. Dobson*, 75 Tenn. 367.

Vermont.—*Bailey v. Troy & Boston R. Co.*, 57 Vt. 252, 52 Am. Rep. 129.

Virginia.—*Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. 163.

Wisconsin.—*Smith v. Milwaukee Bldg., etc., Exchange*, 91 Wis. 360, 64 N. W. 1041.

England.—*Steel v. Southeastern Ry.*, 16 C. B. (Eng.) 550.

Trespasses Committed by Contractor's Servants—Supervision of Railroad's Engineer.—A railroad is not liable for a trespass committed off its right of way by the servants of an independent contractor, though its engineer supervised the work of opening the right of way, so far as to see that it was performed according to contract. So held in *St. Louis, etc., R. Co. v. Knott*, 54 Ark. 424, 16 S. W. 9.

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Railroad Construction Contract.—In *Thomas v. Altoona, etc.*, R. Co., 191 Pa. St. 361, 43 Atl. 215, it is held, that a street railway company which lets out the construction of its road to an independent contractor, and reserves no other control over the work than power to approve or disapprove of it when completed, is not liable for personal injuries caused by the negligence of an employer of the contractor.

Railroad Construction—Nuisance.—As a general rule, a railroad company is not liable for an injury resulting from a nuisance created by the negligence of an independent contractor in constructing its railroad, where it retains no control over the contractor except to see that the road is built according to contract. So held in *Atlanta, etc., R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277.

Construction of Railroad—Destruction of Fences.—A railroad company was not liable to a landowner for the conduct of an independent contractor, who in constructing its railroad on its right of way over the land, made roads through the land, destroyed rails, and threw down and destroyed fences. So held in *St. Louis, etc., R. Co. v. Gillihan* (Ark.), 20 R. R. R. 624, 43 Am. & Eng. R. Cas., N. S., 624, 92 S. W. 793. In this case it was shown that the railroad company exercised no control over the work, except the general right of supervision and inspection, so as to ascertain whether or not the work came up to the requirements of the contract.

Building Contractor—Negligence of Subcontractor's Employees.—A building contractor who lets a portion of the work to a subcontractor does not, by merely retaining the power to inspect the work to see that it is honestly performed, become the master of the subcontractor's employees, so as to be liable for their negligent acts. So held in *Pioneer Construction Co. v. Hansen*, 176 Ill. 100.

Building Contract—Direction and Approval of Owners and Their Architects.—A provision in a building contract, that the work is to be done under the direction of the owners and their architects, and to their entire satisfaction, approval and acceptance, does not prevent the other party to the contract from being an independent contractor, where it is manifest that the contract contemplates the results to be accomplished, and not the method or manner of their accomplishment. So held in *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776.

Injury to Carpenter—Duty to Furnish Safe Tools.—The fact that an employer company reserved such right to so inspect and oversee work undertaken for him by a contractor as was reasonably necessary to see that it conformed to the contract in its results, did not make the contractor its agent, so as to make it liable to one injured while employed as a carpenter upon the work by one acting under the contract, on account of a neglect of duty growing out of the contract of employment between the carpenter and his employer. In such case the relation of master and servant between the company and the carpenter did not so obtain as to raise a duty in the company to furnish safe tools for the former, either directly or through the contractor. So held in *Omaha Bridge & Terminal Co. v. Hargadine* (Neb.), 13 R. R. R. 827, 36 Am. & Eng. R. Cas., N. S., 827, 98 N. W. 1071.

Construction of Brick Work of Barn—Injuries to Contractors' Servants.—In *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776, it appeared that defendants contracted with certain mechanics for the construction of a brick barn; that the contract for the brick work was let to H., and provided that the scaffolding should be furnished by the bricklayer, and that the work should be done under the direction of the architect and defendants, and to their entire satisfaction; that the contract for the carpenter work was let under similar conditions to another mechanic; that defendants had no control over the employees of such contractors, or over the method in which the work should be performed; and that plaintiff was employed by H. It was held,

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that such mechanics were independent contractors; and that defendants were not liable for injuries which happened to the servants of such contractors, through their negligence of that of their servants.

Building Contract—Approval of Architects.—In *Smith v. Milwaukee Bldg., etc.*, Exchange, 91 Wis. 360, 64 N. W. 1041, it is held, that contractors, who had agreed to erect a building according to fixed plans and specifications and of certain materials, were independent contractors, notwithstanding a provision that the work should be performed under the inspection and to the satisfaction of the architects, acting as agents of the owner; it clearly appearing from the whole contract that this was simply a reservation of the right of inspection.

Power to Direct as to Quantity of Work—Approval.—In *Hughes v. Cincinnati & Springfield Ry. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100, it is held, that a right reserved in the contract, on the part of the railroad company, to direct as to the quantity of work to be done, or the condition of the work when completed, is not a right to control the mode or manner of doing the work, within the rule making the company liable for the negligence of an independent contractor.

Railroad Construction Work Superintended by Railroad's Surveyor—Injury to Third Person.—In *Steel v. Southeastern Ry.*, 16 C. B. (Eng.) 550, it is held, that where work is done for a railroad company under a contract, the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though it employs its own surveyor to superintend it, and direct what shall be done.

e. Right to Deviate from Original Plans.

The relation between the parties is not affected by the fact that the employee retains the right to make alterations, deviations, or otherwise control as to the scope of the work, during its progress. *Brown v. Smith*, 86 Ga. 274, 12 S. E. 411; *Riedel v. Moran, Fitzsimons & Co.*, 103 Mich. 262, 61 N. W. 509; *Pack v. City of New York*, 8 N. Y. 221; *Hughes v. Cincinnati & Springfield Ry. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; *Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691.

Building Contract—Approval of Architect—Power to Make Alterations—Opening Left in Temporary Sidewalk—Personal Injuries.—In *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139, it is held, that the provisions in a contract for the erection of a building, that the work should be done under the direction and to the satisfaction of the architect; and that the owner should have the right at any time during the progress of the building to make any alterations, deviations, additions, or omissions from the contract, the cost of which should be added to or deducted from the amount of the contract price, at a fair valuation to be made by the architect, do not have the effect of making the contractors the servant of the owner, and that under such a contract, the persons doing the work are independent contractors; and the owner is not liable for the negligence of one of them, during the progress of the work, in leaving an opening in a temporary sidewalk in front of the building, and over an excavation thereunder, even if it be conceded that the architect, as an agent of the owner, must have known that the contractor, in order to do his work under the sidewalk, would have been compelled to make the opening.

Street Grading Contract—Obligation to Conform to Further Directions.—A municipal corporation that has contracted for the grading of a street, in conformity to a certain plan, is not responsible for an injury resulting from the negligence of the workman employed by the contractor, though the contract provides that the work shall conform to such further directions as may be given by the corporation or its officers. So held in *Pack v. City of New York*, 8 N. Y. 221.

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Contract to Do All Mason Work on Building—Cost Price of Materials and Labor, and Commission Thereon—Orders of Architect.—Where a contractor makes an oral contract to do all the mason work on the other party's building, charging the latter the cost price of materials and labor and a commission thereon, the former is an independent contractor, and not the servant of the owner of the building; and the fact that he takes all his orders from the owner's architect, who makes some changes from the original plans, which are carried out by the contractor, does not change the relation between the latter and the owner of the building, or make the contractor's servants the servants of his employer. So held in *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101.

Contract for Street Work—Power to Direct Changes in Time and Manner.—A stipulation in a city's contract that her engineer shall have power to direct changes in the time and manner of conducting the work, is not such a reservation of power as will make her liable for the injury occasioned by the negligence of the contractor. So held in *City of Erie v. Caulkins*, 85 Pa. St. 247, 27 Am. Rep. 642.

f. Right to Terminate Employment.

And the fact that the employer retains the right to annul the contract at any time does not necessarily prevent the employee from being an independent contractor. *Bayer v. Chicago, etc., R. Co.*, 68 Ill. App. 219; *Blumb v. City of Kansas*, 84 Mo. 112, 54 Am. Rep. 87.

Street Improvement—Blasting—Right to Annul Contract or Suspend Work—Discharge of Employees.—In *Blumb v. City of Kansas*, 84 Mo. 112, 54 Am. Rep. 87, it is held, that a city is not liable for personal injuries resulting from the blasting of rock by a contractor in the necessary performance of his street improvement contract, although the city had reserved the right to annul the contract or suspend work under it, whenever, in the judgment of the city engineer, there was good reason for doing so, and although the contract also made it obligatory upon the contractor to discharge any workman, engaged upon the work, who should disobey any direction of the city engineer as to the workmanship, or material used, or expended upon the work.

Building Contract—Supervision of Architect—Power to Discharge for Delay.—In *Robinson v. Webb*, 74 Ky. 464, it appeared that the owner of a lot contracted with a builder, that the latter, furnishing all the materials and labor, should erect thereon a building for a fixed price, to be done under the supervision of an architect, who, in the event the work should be delayed, was authorized to employ another builder; and, without his consent, the builder was not to sublet any of the work. It was held, that the builder was an independent contractor.

Contract to Remove Dead and Maimed Cattle from Railroad Yard—Personal Injuries Inflicted by Crippled Steer.—But in *Texas & Pac. R. Co. v. Juneman* (C. C. A.), 71 Fed. Rep. 939, 18 C. C. A. 394, it is held, that one engaged by a railroad company under a verbal contract to remove dead and maimed cattle from the railroad yard, who is paid in the same way and at the same time as laborers generally in the service of the company, and may be discharged in the same way, is not such an independent contractor that the company is exempt from liability for injuries caused by failure to remove a crippled but dangerous steer.

Removal of Earth from Railroad Cuts—Discretion of Railroad's Engineer to Terminate Contract.—And a contract with a railroad for the removal of earth from cuts required the contractor to furnish all work, tools, and equipment to do all the grading required for filling at a certain place under the direction and to the satisfaction of the chief engineer, who should also determine the width of the embankment to be constructed, and who was empowered to terminate the contract whenever he deemed it for the railroad's best interest. The

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railroad was to pay the contractor a certain price for each cubic yard of grading done, and the contractor obligated himself to take certain precautions, to pay damages to stock and other property occasioned by his negligence, and to save the railroad harmless from liens. It was held, that the contractor was not an independent contractor, but the servant of the railroad, for whose negligence in removing the soil from private property the company was liable. *Parrott v. Chicago Great Western Ry. Co. (Iowa)*, 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253, 103 N. W. 352.

g. Right to Discharge Workmen Retained.

Nor does the fact that the employer retains the power to discharge incompetent workmen render him responsible for the contractor's conduct, as for that of a servant or agent. *Reedie v. London & N. W. Ry. Co.*, 4 Exch. (Eng.) 244; *Bayer v. Chicago, etc., R. Co.*, 68 Ill. App. 219; *Hale v. Johnson*, 80 Ill. 185; *Jefferson v. Jameson*, 165 Ill. 138, 46 N. E. 272; *Tibbetts v. Knox & L. R. Co.*, 62 Me. 437.

Where work is being done for a railroad company, under a contract, the fact that the company retains the right to demand the discharge, under certain circumstances, of an employee of the person doing the work, does not make such company the principal or master, so as to render it liable for the negligent acts of the contractor whereby injuries result to his employees. So held in *Bayer v. Chicago, etc., R. Co.*, 68 Ill. App. 219.

Construction of Railroad Bridge—Pedestrian Killed by Falling Stone.—In *Reedie v. London & N. W. Ry. Co.*, 4 Exch. (Eng.) 244, it appeared that a company authorized by law to construct a railway contracted with certain persons to make a portion of the line, and by the contract reserved to itself the power of dismissing any of the contractors' hands for incompetency; and that the workmen in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him. It was held, that the railroad company was not liable, notwithstanding the terms of the contract.

Contract to Reduce Grade of and Straighten Railroad—Authority Retained to Approve Work, Deviate from Plans, and to Discharge Employees.—A contract between a railroad company and railroad contractors for the reduction of grades and taking out of curves on a section of the road provided that the contractors were to furnish the requisite laborers, tools, engines, and machinery, which labor, tools, etc., were to be furnished and the work to be done to the satisfaction of the railroad company's engineer; and that the engineer could make any alteration deemed necessary in the plan of the work, and should decide on the quality and quantity of the work done; that no part of the contract should be transferred without his consent; and that the contractors should discharge any person at his direction; that if it appeared to the engineer that the work would not be completed within the specified time, he could employ additional laborers and charge the amount paid them to the contractors; and that the railroad company should furnish necessary rails, switches, etc., for a temporary track, without charge. It was held, that, under such contract, the relation of the railroad company was that of independent contractors. *Louisville & N. R. Co. v. Cheatham (Tenn.)*, 100 S. W. 902.

Construction Train under Control of Contractor, Subject to Certain Regulations—Engine Servant of Railroad—Mule Killed.—But in *New Orleans, etc., R. Co. v. Norwood*, 62 Miss. 565, 52 Am. Rep. 191, it appeared that a railroad company employed a contractor to do certain work upon its road, and paid him therefor a stipulated price, and furnished him a construction train and an engineer to run the same; that the company prohibited the running of this train at a greater rate of speed than thirteen miles an hour, and required that

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it should be on a sidetrack fifteen minutes before the schedule time for each of the company's trains; that, subject to these regulations, the control, management, and direction of the construction train was given wholly to the contractor; that the engineer was selected by the company, and it alone had the right to discharge him, though bound to do so upon the complaint of the contractor, and to supply his place; that the company paid the engineer's wages, but charged the same to the conductor, and deducted the amount thereof from the sum due for his work; and that a mule having been killed by the negligent running of such construction train, the owner sued the railroad company for the value thereof. It was held, that such engineer was the servant of the railroad company.

h. Nature of Compensation.

Paid by the Day.—The fact that a contractor is paid by the day does not prevent him from being an independent contractor. So held in *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699.

Compensation Measured by a Per Diem—Material Furnished.—One's character as an independent contractor is not affected by the facts that his compensation is measured by a per diem to himself and those employed by him and the owner furnishes the material for the work. So held in *Emmerson v. Fay*, 34 Va. 60, 26 S. E. 386.

Percentage on Cost of Work.—A contractor engaged in the construction of a building, who employs and pays the laborers himself, without being under the control of the owner of the building, is an independent contractor, though he is to be paid a percentage on the cost of erection; and the owner is not liable for the contractor's or his vice principal's negligence. So held in *Whitney-Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242.

Construction of Vault under Sidewalk—Absence of Guards—Injury to Pedestrian—Reasonable Compensation for Job or Per Diem Wage.—In *Fuller v. Citizens' Nat. Bank of Galion (C. C.)*, 15 Fed. Rep. 875, it is held, that where the owner of property lets the whole work of excavating and finishing a vault in front of his property to a party, as a contractor, to finish and complete the whole as a job, without reserving any control or direction over him in its construction, or over the construction of the work or the place where it was being constructed, or the mode of its execution or the workmen to be employed to do it, although such contractor is to be paid a reasonable compensation for the work when completed, or is to be paid by the day, and no fixed price is agreed on, and although the owner furnishes the material, he will not be liable for the negligence of such contractor in not providing suitable guards against danger to persons passing on the sidewalk.

Contract to Do Work by Job.—In *Clark v. Vermont & Canada R. Co.*, 28 Vt. 103, it is held, that a person is not liable for injuries occasioned by the acts or neglect of the servants of one who has contracted to do a piece of work for him by the job.

Employment of Person and His Team—Fixed Wage Per Week and Commissions.—But in *Shea v. Reems*, 36 La. Ann. 966, it is held, that where a person with his horse and wagon is employed by another to perform services for the latter at a fixed wage of so much per week and certain additional commissions, the payment of wages establishes the relation of master and servant, implies subjection of the latter to the control and direction of the former, and gives rise to the responsibility of the master for the servant's negligent injuries in the course of his employment.

Laborers Hired for Railroad Company by Person Engaged in Constructing Part of Road.—And in *New Orleans, etc., R. Co. v. Reese*, 61 Miss. 581, 18 Am. & Eng. R. Cas. 110, it appeared that a person engaged in constructing part of the roadbed of a railroad employed laborers, whose names were entered on the pay roll of the railroad company and who were in fact employees of the company and re-

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ceived their pay from it; and that the person who engaged them was merely the instrument of employing them for the railroad company. It was held, that this would fix his relation to the company as its servant.

II. EMPLOYER'S LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR.

1. GENERAL RULE.

It follows from the nature of the relation between an employer and independent contractor, as previously defined, that an employer is not, as a general rule, responsible for the acts or omissions of an independent contractor, or those of his employees.

England.—*Ellis v. Sheffield Gas Consumers' Co.* (Eng.), 2 El. & Bl. 766; *Innocent v. Peto*, 4 F. & F. (Eng.) 8; *Murray v. Currie* (Eng. Law Rep.), 6 C. P. 24; *Nicholson v. Fields*, 2 Hurl & N. (Eng.) 825; *Overton v. Freeman*, 11 C. B. (Eng.) 867; *Searle v. Laverick*, 9 Q. B. (Eng.) 122; *Steel v. Southeastern Ry.*, 16 C. B. (Eng.) 550.

United States.—*Chicago City v. Robbins*, 2 Black (U. S.) 419; *Dwyer v. National Steamship Co.* (C. C.), 4 Fed. Rep. 493; *Fuller v. Citizens' Nat. Bank of Galion* (C. C.), 15 Fed. Rep. 875; *M'Namee v. Hunt*, 87 Fed. Rep. 298, 30 C. C. A. 653; *Robbins v. Chicago City*, 4 Wall. (U. S.) 657; *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.) 566.

Alabama.—*Chattahoochee, etc., R. Co. v. Behrman*, 136 Ala. 508, 35 So. 132, 7 R. R. R. 920, 30 Am. & Eng. R. Cas., N. S., 920; *Massey v. Oates* (Ala.), 39 So. 142.

Arkansas.—*St. Louis, etc., Ry. Co. v. Gillihan* (Ark.), 20 R. R. R. 624, 43 Am. & Eng. R. Cas., N. S., 624, 92 S. W. 793.

Florida.—*St. Johns & Halifax R. Co. v. Shalley*, 33 Fla. 397, 14 So. 390.

Georgia.—*Savannah, etc., R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82.

Illinois.—*Bayer v. Chicago, etc., R. Co.*, 68 Ill. App. 219; *Boyd v. Chicago & N. W. Ry. Co.* (Ill.), 75 N. E. 496, 20 R. R. R. 154, 43 Am. & Eng. R. Cas., N. S., 154; *Hale v. Johnson*, 80 Ill. 185; *Jefferson v. Jameson*, 165 Ill. 138, 46 N. E. 272; *Kepperly v. Ramsden*, 83 Ill. 354; *McDermott v. McDaniel*, 55 Ill. App. 226; *Pfau v. Williamson*, 63 Ill. 16; *Pioneer Fireproof Const. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Prairie State L. & T. Co. v. Doig*, 70 Ill. 52; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Village of Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33; *West v. St. Louis, etc., R. Co.*, 63 Ill. 545; *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242.

Indiana.—*New Albany Forge & Rolling Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294; *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123; *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747; *Wabash, St. L. & Pac. Ry. Co. v. Farver*, 111 Ind. 195, 31 Am. & Eng. R. Cas. 134, 12 N. E. 296.

Iowa.—*Brown v. McLeish*, 71 Iowa 381, 32 N. W. 385; *Callahan v. Burlington, etc., R. Co.*, 23 Iowa 562; *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776; *Kellogg v. Payne*, 21 Iowa 575; *Miller v. Minnesota N. W. Ry. Co.*, 76 Iowa 655, 39 N. W. 188; *Overhouser v. American Cereal Co.*, 118 Iowa 417, 92 N. W. 74; *Wood v. The Indiana School Dist. of Mitchell*, 44 Iowa 27.

Kansas.—*Kansas Cent. Ry. Co. v. Fitzsimmons*, 18 Kan. 34; *St. Louis, etc., R. Co. v. Willis*, 38 Kan. 330, 33 Am. & Eng. R. Cas. 397, 16 Pac. 728.

Kentucky.—*Robinson v. Webb*, 74 Ky. 464.

Louisiana.—*Camp v. Church Wardens, etc.*, 7 La. Ann. 321; *Galagher v. Southwestern Exposition Ass'n*, 28 La. Ann. 946; *Peyton v. Richards*, 11 La. Ann. 62.

Maine.—*Eaton v. European & N. A. Ry. Co.*, 59 Me. 520; *McCarthy v. Second Parish of Portland*, 71 Me. 318, 36 Am. Rep. 320; *Tibbets v. Knox & L. R. Co.*, 62 Me. 437.

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Maryland.—*City & S. Ry. Co. v. Moores*, 80 Md. 348, 30 Atl. 643; *Deford v. State*, 30 Md. 179; *Evans v. Murphy*, 87 Md. 498, 40 Atl. 109; *Smith v. Benick*, 87 Md. 610, 41 Atl. 56.

Massachusetts.—*Conners v. Hennessey*, 112 Mass. 96; *Forsyth v. Hooper*, 93 Mass. 419; *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743; *Linton v. Smith*, 74 Mass. 147.

Michigan.—*DeForrest v. Wright*, 2 Mich. 368; *Reier v. Detroit Steel & Spring Works*, 109 Mich. 244, 67 N. W. 120; *Riedel v. Moran-Fitzsimons Co.*, 103 Mich. 262, 61 N. W. 509; *Piette v. Bavarian Brewing Co.*, 91 Mich. 605, 52 N. W. 152.

Minnesota.—*Shute v. Princeton Township*, 58 Minn. 337, 59 N. W. 1050.

Missouri.—*Barry v. City of St. Louis*, 17 Mo. 121; *Blumb v. City of Kansas*, 84 Mo. 112, 54 Am. Rep. 87; *Burns v. McDonald*, 57 Mo. App. 599; *City of Independence v. Slack*, 134 Mo. 66, 34 S. W. 1094; *Clark's Adm'x v. Hannibal & St. Jo. R. Co.*, 36 Mo. 202; *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376; *Lancaster v. Connecticut Mutual Life Ins. Co.*, 92 Mo. 460, 5 S. W. 23; *Long v. Moon*, 107 Mo. 334, 17 S. W. 810; *McKinley v. Chicago, etc., R. Co.*, 40 Mo. App. 449, 450; *Morgan v. Bowman*, 22 Mo. 538; *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 15 S. W. 1112.

Nebraska.—*Meyer v. Midland Pac. R. Co.*, 2 Neb. 319; *Omaha Bridge & Terminal Co. v. Margadine (Neb.)*, 13 R. R. R. 827, 36 Am. & Eng. R. Cas., N. S., 827, 98 N. W. 1071; *Palmer v. City of Lincoln*, 5 Neb. 136, 25 Am. Rep. 479.

New Hampshire.—*Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572; *Knowlton v. Hoit*, 67 N. H. 155, 30 Atl. 346.

New Jersey.—*Conway v. Furst*, 57 N. J. L. 645, 32 Atl. 380; *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17; *Redstrake v. Swayze*, 52 N. J. L. 129, 18 Atl. 697.

New York.—*Benedict v. Martin*, 36 Barb. (N. Y. Sup. Ct.) 288; *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957; *Brennan v. Ellis*, 70 Hun (N. Y. Sup. Ct.) 472, 24 N. Y. Supp. 426; *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262; *Clare v. Nat. City Bank*, 140 N. Y. Sup'r Ct. 104; *Cullom v. McKelvey*, 26 N. Y. App. Div. 46, 49 N. Y. S. 669; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Engel v. Eureka Club*, 137 N. Y. 100, 134, 32 N. E. 1052; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Gardner v. Bennett*, 33 N. Y. Sup'r Ct. 197; *Gilbert v. Beach*, 5 Bosw. (N. Y. Sup'r Ct.) 445; *Hawke v. Brown*, 28 N. Y. App. Div. 37, 50 N. Y. S. 1032; *Herrington v. Village of Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755; *Keller v. Albrahams*, 13 Daly (N. Y. Com. Pl.) 188; *Kelley v. City of New York*, 11 N. Y. 432; *Kelly v. Cohoes Knitting Co.*, 84 Hun (N. Y. Sup. Ct.) 154; *King v. New York, etc., R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Larock v. Ogdensburg, etc., R. Co.*, 33 N. Y. Sup. Ct. Rep. 382; *McCafferty v. Duyvil*, 61 N. Y. 178; *McCann v. Kings County, etc., R. Co. (City Ct. Brook.)*, 19 N. Y. Supp. 668; *M'Loughlin v. New York Lighterage & Tramps Co. (N. Y. Com. Pl.)*, 27 N. Y. Supp. 248; *McMullen v. Hoyt*, 2 Daly (N. Y. Com. Pl.) 271; *Maltbie v. Bolting*, 26 N. Y. Supp. 903, 6 N. Y. Misc. 339; *Marsh v. Hand*, 120 N. Y. 315, 24 N. E. 463; *Martin v. Tribune Ass'n*, 30 Hun (N. Y. Sup. Ct.) 391; *Murphy v. Altman*, 28 N. Y. App. Div. 472, 51 N. Y. S. 106; *O'Rourke v. Hart*, 7 Bosw. (N. Y. Sup'r Ct.) 511; *Pack v. City of New York*, 8 N. Y. 221; *Potter v. Seymour*, 4 Bosw. (N. Y. Sup'r Ct.) 140; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808; *Ryder v. Thomas*, 13 Hun (N. Y. Sup. Ct.) 196; *Schular v. Hudson River R. Co.*, 38 Barb. (N. Y.) 653; *Slater v. Mersereau*, 64 N. Y. 138; *Town of Pierrepont v. Loveless*, 72 N. Y. 211; *Wiener v. Hammell (City Ct. N. Y.)*, 14 N. Y. Supp. 365.

North Carolina.—*Hunt v. Vanderbilt*, 115 N. Car. 559, 20 S. E. 168.

Ohio.—*Carman v. Steubenville & Indiana R. Co.*, 4 Ohio St. 399;

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Chambers' Arm'r. v. Ohio Life Insurance & Trust Co., 1 Disn. (Ohio) 327; *City of Cincinnati v. Stone*, 5 Ohio St. 38; *Clark v. Fry*, 8 Ohio St. 358; *Hughes v. Cincinnati & Springfield R. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 54 N. E. 269.

Pennsylvania.—*Allen v. Willard*, 57 Pa. St. 374; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Chartiers Val. Gas Co. v. Waters*, 123 Pa. St. 220, 16 Atl. 423; *City of Erie v. Caulkins*, 95 Pa. St. 247, 27 Am. Rep. 642; *Eby v. Lebanon County*, 166 Pa. St. 632, 31 Atl. 332; *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699; *Heidenway v. Philadelphia*, 168 Pa. St. 72, 31 Atl. 1063; *Jones v. Philadelphia Traction Co.*, 185 Pa. St. 75, 39 Atl. 889; *Pennsylvania R. Co. v. Canfield*, 46 Pa. St. 211, 213; *Reed v. Allegheny City*, 79 Pa. St. 300; *School District v. Fuess*, 94 Pa. St. 600, 42 Am. Rep. 627; *Smith v. Simmons*, 103 Pa. St. 32, 49 Am. Rep. 113; *Thomas v. Altoona, etc., R. Co.*, 191 Pa. St. 361, 41 Atl. 215; *Wray v. Evans*, 80 Pa. St. 102.

Rhode Island.—*Read v. East Providence Fire District*, 20 R. I. 574, 40 Atl. 760; *Sanford v. Pawtucket St. R. Co.*, 19 R. I. 537, 35 Atl. 67, 4 Am. & Eng. R. Cas. N. S., 518.

Tennessee.—*Knoxville Iron Co. v. Dobson*, 75 Tenn. 367.

Texas.—*Houston, etc., R. Co. v. Van Bayless*, 1 White (Tex. Civ. App.) 500.

Vermont.—*Bailey v. Troy & Boston R. Co.*, 57 Vt. 252, 52 Am. Rep. 129; *Clark v. Vermont & Canada R. Co.*, 28 Vt. 103.

Virginia.—*Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. 163.

Washington.—*Easter v. Hall*, 12 Wash. 160, 40 Pac. 728.

West Virginia.—*Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin.—*Carlson v. Stocking*, 19 Wis. 432; *Hackett v. Western Union Tel. Co.*, 80 Wis. 187, 49 N. W. 822; *Smith v. Milwaukee Bldg., etc., Exchange*, 91 Wis. 360, 64 N. W. 104.

2. OTHER STATEMENTS OF GENERAL RULE.

Where the employment of the contractor is an independent employment, and he is not guided or directed by the railroad company, his employer, as to the manner of performing the work in hand, the result being looked to as the primary and the means as the entirely secondary consideration, the railroad will not be held liable for injuries occasioned by his negligence. The employer is not liable to a third person for damages resulting from the negligent manner in which work is done by a person with whom he has contracted for its performance. So held in *Kellogg v. Payne*, 21 Iowa 575.

A contractor is not the agent of his employer, except as to the specific results which he undertakes to accomplish; and the employer is not responsible to third persons for his negligence, or for the negligence of servants or other persons employed by him in the execution of the work. So held in *Holt v. Whatley*, 51 Ala. 569.

A railroad company may let to an independent contractor the contract to do any work, the probable effect of which would not be injurious to another, without incurring any liability for the negligence of the contractor's employees. So held in *St. Louis, etc., R. Co. v. Yonley*, 53 Ark. 503, 14 S. W. 800.

When a person makes an independent contract with another, by which the latter is to do for the former a piece of work in itself harmless, and the latter does the work so carelessly or unskillfully as to injure a third party, the former is not, as a general rule, liable. So held in *Williams v. Fresno C. & I. Co.*, 96 Cal. 14, 30 Pac. 961.

Where work, which does not necessarily create a nuisance, but is in itself harmless and lawful when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish such end by means which he is to make use of at his discretion, the latter is, in respect to such means, the master;

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and if a third person is injured by reason of the negligent use thereof, the employer is not liable. So held in *Wabash, St. L. & Pac. R. Co. v. Farver*, 111 Ind. 195, 31 Am. & Eng. R. Cas. 134, 12 N. E. 296.

In *Ryder v. Thomas*, 13 Hun (N. Y. Sup. Ct.) 196, it is held, that the owner of real estate is not liable for the acts of a contractor employed to do work upon it, unless the contractor is his employee, or unless the work, as authorized by the contract, necessarily produced the injury, or unless the injuries were occasioned by the omission of some duty imposed upon him.

In *Wray v. Evans*, 80 Pa. St. 102, it is held, that persons not personally interfering with the progress of a work or directing its progress, but contracting with third persons to do it, are not responsible for a wrongful act or for negligence in the performance of the contract, if the act agreed to be done be lawful.

Servants of Contractor.—The servants of a contractor are the servants of his principal only where the latter has the right to select and control them. So held in *Burke v. Norwich & Worcester R. Co.*, 34 Conn. 474.

3. ILLUSTRATIONS OF GENERAL RULE.

Grading Railroad—Blasting—Right to Retain Money to Pay Damages—Injuries to Buildings.—A railroad is not liable for injuries to buildings in the vicinity of its road caused by blasting done by those who have contracted to grade the road, or persons in their employ, although under the contract the company reserves the right to retain in its hands sums sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted. So held in *Tibbets v. Knox & L. R. Co.*, 62 Me. 437.

Contract Duty to Furnish Materials for Construction of Railroad—Wrongful Taking of Trees.—A railroad company is not responsible for the wrongful act of a contractor in taking trees from the land of another in procuring material to be furnished under his contract. So held in *New Orleans, etc., R. Co. v. Reese*, 61 Miss. 581, 18 Am. & Eng. R. Cas. 110.

Construction of Railroad—Negligence of Contractor's Servants.—A railroad company is not liable for the injuries occasioned by the trespass or negligence of the servants employed by the contractor in building its railroad. So held in *Clark's Adm'x v. Hanibal & St. Jo. R. Co.*, 36 Mo. 202.

Contractor Using Appliance Furnished after It Becomes Defective—Injury to Third Person.—In *King v. New York, etc., R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37, it is held, that where the owner of an appliance not in itself dangerous allows another person competent to manage it to take and use it, and while in the possession and use of the other it becomes defective and injures a third person, the owner is not liable; and the fact that the right to use it was given under a contract by which it was to be used in performing work for the owner upon his premises does not change his liability.

Construction of Street Railway—Wire Stretched Across Street by Contractor—Injury to User of Street.—A street railway company, which was empowered by its charter to build a street railroad, employed a contractor to construct the road, not stipulating the particular manner in which the construction should be carried out. It was held, that the company was not liable for injuries caused to a person by a wire stretched across the street by the contractor in the construction of the road. *Sanford v. Pawtucket Street R. Co.*, 19 R. I. 537, 4 Am. & Eng. R. Cas., N. S., 318, 35 Atl. 67.

Injuries to Third Persons.—In *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. 163, it is held, that where an employer selects with due care a competent contractor, and to him commits a work that is lawful, and such as may be done without injury to third persons, and to be done in a workmanlike manner, at a stipulated price, such em-

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ployer cannot be held liable for injuries caused by the negligence of such contractor or his servants to third persons, not servants of such employer nor passengers on its cars.

Bill of Lading, for Cotton Delivered by Plaintiff to Independent Compress Company, Issued by Carrier—Destruction by Fire—Liability of Carrier for Negligence of Compress Company.—Pursuant to a rule of the Texas Railroad Commission, providing that when cotton is tendered to railroad companies on compress platforms situated on the track of such railroad companies, it shall be the duties of such companies to take charge of and receipt for the cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at their own depots and platforms, etc., defendant company issued a bill of lading for cotton delivered by plaintiff to an independent compress company on a compress receipt, the bill of lading providing that each carrier carrying the cotton should be entitled at his own cost to compress the same for greater convenience in handling and forwarding, etc. While the cotton was on the platform of the compress company with other cotton, and before actual delivery to defendant, but after the issuance of such bill of lading, it was destroyed by fire communicated by an engine of another railroad company. It was held, that the compress company, being a separate, independent contractor, was not the servant or agent of defendant, and that the latter was not therefore liable for its negligence in storing or handling the cotton. *Arthur v. Texas & P. R. Co. (C. C. A.)*, 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17, 139 Fed. Rep. 127.

Pulling Down Wall—Failure to Shore—Injury to Adjoining House.—In *Nicholson v. Fields*, 2 Hurl. & M. (Eng.) 825, it appeared that plaintiff and defendant were owners of adjoining ancient houses; that an architect employed by defendant to superintend the repairs of his house, having considered it necessary to pull down and rebuild the front wall, agreed with a contractor to do the work for an estimated price; and that the workmen of the contractor in pulling down the wall removed a breastsummer which was inserted in the party wall between the defendant's and plaintiff's house, without taking any precautions by shoring or otherwise; in consequence of which the front wall of the plaintiff's house fell. It was held, that there was no evidence for the jury of any liability on the part of defendant; the principle that where a person employs another to do a lawful act, it must be presumed, in the absence of evidence to the contrary, that he employed him to do it in a careful and proper manner; and, unless the relation of master and servant exists between them, the employer is not responsible for the negligent manner in which the act is done, being applicable.

Paving Street—Material Left Unguarded in Pathway by Subcontractor's Employees—Injury to Pedestrian.—In *Overton v. Freeman*, 11 C. B. (Eng.) 867, it appeared that A contracted with parish officers to pave a certain district, and entered into a subcontract with B, under which the latter was to lay down the paving of a street, the materials being supplied by A, and brought to the spot in his carts. Preparatory to the paving, the stones were laid by laborers employed by B on the pathway, and there left unguarded at night, in such a manner as to obstruct the same; and C fell over them and broke his leg. It was held, that A was not responsible for such negligence.

Shed Blown Down—Traveler's Carriages Injured.—In *Searle v. Laverick*, 9 Q. B. (Eng.) 122, it appeared that plaintiff brought his horses and two carriages to defendant, a livery stable keeper, and they were placed under a shed on defendant's premises; that the shed had just been erected, the upper part being still in the hands of workmen; that defendant had employed a builder to erect the shed for him, as an independent contractor, and he was a competent person for such em-

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ployment, and that the shed was blown down by a high wind, defendant being ignorant of any defect in it, and the carriages were injured. It was held, that defendant, if he had exercised in the employment of the builder such care as an ordinarily careful man would use, was not liable on account of the negligence of the builder, of which he had no notice.

Excavations for Building Purposes—Injury to House on Adjacent Lot.—A landowner is not liable for injuries to a house on an adjacent lot, caused by excavations for building purposes on his own lot, when done by a skilled contractor, to whom the job had been let. So held in *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719.

Trap Door Left Open—Personal Injuries—Negligence of Plumber.—In *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329, it appeared that the owner of a building employed a plumber to repair the water pipes therein, and left him to proceed in his own way to accomplish such result; and that the servants of the plumber, while engaged in making the repairs, negligently left open a trap door, through which plaintiff fell and was injured. It was held, that the plumber was an independent contractor; and that the owner was not liable for such negligence of his employees.

Real Estate Repairs—Personal Injuries to Third Persons.—Where the owner of real estate requiring repairs employs a contractor to do the entire work, with his own means and by his own servants, such owner is not responsible for personal injuries to third persons occurring through negligence in the performance of the work. So held in *DuPratt v. Lick*, 38 Cal. 691.

Construction of Cellar under Street Sidewalk—Surrender of Possession of Property—Injury to Third Person.—In *Pfau v. Williamson*, 63 Ill. 16, it is held, that where the owner of a lot in a city contracts with a skillful, reliable and competent builder for the erection of a house thereon, including a cellar under the sidewalk in the street, and surrenders possession of the property to the builder for the purposes of the work, and the work is not done under the direction of the owner, and injury ensues to a third person from the negligence of the contractor, and not of the owner, such contractor is not the servant of the owner, and the latter is not liable for such injury.

Contract to Take and Deliver Sand from Furnace Company's Land—Agreed Price Per Load.—In *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376, it is held, that one who contracts with a furnace company to take sand from its land, and to deliver it at its furnace at an agreed price per load, there being no stipulation as to the manner of digging the sand, is an independent contractor, and the company is, therefore, not liable for his negligence in conducting the work.

Manhole in Sidewalk—Negligence of Coal Company.—In *Benjamin v. Metropolitan St. R. Co.*, 133 Mo. 274, 34 S. W. 595, it is held, that where a person is permitted by a city ordinance to maintain a manhole in the sidewalk in front of his premises for the reception of coal, and a coal company, as an independent contractor, delivers coal through the manhole, the property owner is not responsible for the company's negligence in performing its contract; but that such exemption from responsibility continues only while the contractor is engaged in the performance of his contract.

Negligence in Taking Down Wall of Building—Death of Third Person.—In *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052, it appeared that the owner of a building entered into a contract with a competent builder to make certain alterations therein, which included the taking down of a wall, the contractor to furnish the materials and to receive a fixed price for the whole work; and that in consequence of negligence on the part of the contractor in taking down the wall, a work which was not intrinsically dangerous, the

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wall fell and killed plaintiff's intestate. It was held, that the owner of the building was not liable; and that the fact that the wall had become weakened by age and decay did not affect the liability of the owner, as it appeared that the wall was safe and would not have fallen if left as it was when the contract was made.

Construction of House—Blasting—Negligence of Subcontractor—House Injured on Adjoining Premises.—In *French v. Vix*, 143 N. Y. 90, 37 N. E. 612, it appeared that the owner of a lot adjoining that of plaintiff, entered into a contract with defendants by which they agreed to build a house upon said lot and "to become answerable and accountable for any damages * * * to the property * * * during the performance of said work;" that defendants entered into a contract with D., by which the latter agreed to do the necessary excavation, to assume "all responsibility for any loss or damage to persons or property" while engaged in the work, and to save defendants harmless therefrom; that in blasting rock upon said lot, while D. was engaged in the performance of his contract, plaintiff's house was injured, and the evidence tended to show that the injury was caused by the negligent manner in which D. conducted the work of blasting. It was held, that defendants were not liable for such negligence on the part of D.

Repairing Cornice of Hotel—Fall of Plank from Scaffold—Passer-By Injured.—In *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, it appeared that defendant employed B., who was engaged in the roofing and cornice business, to make some repairs to the cornice of his hotel, in the city of New York; that the defect was pointed out, but no price or plan for doing the work was specified and the method of repair and the means to be employed were left entirely to the judgment of B., who merely agreed to remedy the defect; that in doing the work the employees of B. suspended a ladder from the roof of the hotel, upon which planks were placed to serve as a scaffold; that a gust of wind caused one of the planks to fall so that it struck and injured plaintiff who was passing; that defendant was not in the city when the repairs were being made, and had no knowledge of the manner in which the work was being done. It was held, that defendant was not liable, as B. was an independent contractor.

Erection of Building—Excavating below Foundation of Adjoining Store—Unauthorized Trespasses.—In *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. 343, it appeared that defendants, being about to erect a building in the city of New York upon a lot adjoining a store leased and occupied by plaintiffs, which required an excavation below the foundation of plaintiffs' store, entered into a contract with a firm of professional "shorers," by which that firm agreed "to do the shoring, sheath-piling and bridging that is necessary to erect" the building on defendant's lot, and to be responsible for any accident by improperly doing the work; that such firm, without plaintiff's permission and against their protest, entered upon their premises, broke through the walls, inserted needle beams, and occasioned serious damage to their stock of goods. It did not appear that defendants gave any directions to the contractors, advised the entry, or had any knowledge of the circumstances under which the latter entered upon plaintiffs' premises. In an action of trespass, it was held, error on the part of the trial court to charge that if plaintiffs gave no license to the contractors, defendants were liable for the injury.

Excavating—Blasting—Injury to Adjoining Premises.—In *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808, an action to recover on account of damages to plaintiff's dwelling, alleged to have been caused by negligent blasting in excavating on defendant's adjoining premises, the answer was a general denial save as to the ownership of defendant's premises; that on the trial defendant was permitted to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation. It was held, that

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this was not error, as the action was not for a trespass or the creating of a nuisance, but for negligence, and defendant was entitled under the answer to show that the act of negligence complained of was not his but that of another; and, if done by an independent contractor, he was not liable.

4. INCOMPETENCY OF CONTRACTOR.

But an employee is responsible for the results of his conduct in knowingly employing an incompetent independent contractor.

Kentucky.—*James v. McMinimy*, 93 Ky. 471, 20 S. W. 435.

Louisiana.—*Camp v. Church Wardens*, etc., 7 La. Ann. 321.

Massachusetts.—*Conners v. Hennessey*, 112 Mass. 96.

Missouri.—*Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451.

New Jersey.—*Cuff v. Newark*, etc., R. Co., 35 N. J. L. 17; *Redstrake v. Swayze*, 57 N. J. L. 129, 18 Atl. 697.

New York.—*Berg v. Parsons*, 84 Hun (N. Y. Sup. Ct.) 60, 31 N. Y. Supp. 1091.

Pennsylvania.—*Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662.

Tennessee.—*Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691.

In *Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691, it is held, that for injuries inflicted by the negligence of an independent contractor, or his employees, while performing his employer's work, the latter is not responsible, if the contractor was a fit and proper person for the employment, and the work agreed to be done was not unlawful in itself, nor necessarily attended with danger to others.

Blasting in City.—Where the owner of property in New York city employs a competent contractor to blast out rock, he is not liable for injuries caused by the negligence of the contractor. So held in *Wiener v. Hammell* (City Ct. N. Y.), 14 N. Y. Supp. 365.

Negligent Construction of Building—Injury to Workman—Competency of Clerk of the Works.—In *Brown v. Accrington Cotton Co.*, 3 Hurl. & C. (Eng.) 511, it is held, that a person who erects a building by contract, and employs a clerk of the works to superintend the erection, is not liable for injury occasioned to a workman in the building by reason of its negligent construction, unless he personally interfered or negligently appointed an incompetent clerk of the works with knowledge of his incompetency.

Waste Fireworks Given to Boy by Father of Contractor's Employee—Liability of Railway as Owner of Amusement Park.—A street railway owned an amusement park and provided suitable places for the exhibition of fireworks, which was in charge of a competent independent contractor; and, a piece of fireworks failing to explode, the father of the man in charge, who was assisting as a volunteer, gave it to a boy and told him to take it away and have a good time with it, and the boy touched a lighted match to it and was injured by its explosion. It was held, that railway company was not liable. *Noggle v. Carlisle & Mt. H. R. Co.* (Pa.), 64 Atl. 547, 21 R. R. R. 627, 44 Am. & Eng. R. Cas., N. S., 627.

Knowledge of Contractor's Bad Character.—But in *Knoxville Iron Co. v. Dobson*, 75 Tenn. 367, it is held, that an employer is not liable to others for injuries resulting from the negligence of an independent contractor, although the employer may have known that the contractor was of bad character.

5. EMPLOYER'S SERVANT TRANSFERRED TO CONTRACTOR—LIABILITY FOR ACTS OF.

And if the employer transfers his own servant to the employment and control of the contractor, to aid in the execution of the contract work, the former is not responsible for the servant's conduct while

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he is working for the contractor under such arrangement. *Murray v. Currie* (Eng. Law Rep.), 6 C. P. 24; *Wood v. Cobb*, 95 Mass. 58; *Ditberner v. Rogers*, 66 How. Prac. (N. Y.) 35; *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75, 50 N. E. 500; *Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691.

Negligence of Employer's Servant While Working for Contractor.—Where the master employs an independent contractor to perform a specified piece of work, and furnishes his own general servant, a competent person, to aid the contractor and be under his exclusive control and direction in the performance of that particular work, the contractor, and not the general master, is responsible for the acts and negligence of the servant while thus engaged. So held in *Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691.

Contract to Repair Building—Operation of Elevator, at Contractor's Demand, by Owner's Servant—Injury to Plasterer of Shaft.—In *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75, 50 N. E. 500, it appeared that a contractor for the repair of a building, including the furnishing of elevators, having placed the elevators in position, called upon a general servant of the owner of the building, whose duty it was to conduct the elevators for passengers, to operate an elevator so that a mason, in the service of the contractor, could use it as a moveable platform in plastering the shaft; that such conductor, having suspended carrying passengers, operated the elevator for the mason, under the latter's direction; and while so engaged the mason was injured through the conductor's negligence. It was held, that the owner of the building could not be held liable under the doctrine of respondeat superior.

Brakeman Furnished by Construction Company Injured through Negligence of Subcontractors' Engineer.—*Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691, it appeared that the defendant construction company, having undertaken to build the railroad, sublet the laying of the track from a certain point "as far as the chief engineer" of the company "may determine and order," at the price of \$475 per mile; that the subcontractors agreed to unload the rails, ties, and fastenings on their arrival, to reload and unload them in making their distribution, and to lay and surface the track; that the construction company agreed to "furnish push cars, locomotive, flats and engineer, fireman, and one brakeman," to be used and controlled by the subcontractors in doing the work; that the whole work was to be done "in a thorough and workmanlike manner, to the satisfaction of the chief engineer" of the company; that the servants furnished by the company in compliance with such contract were competent, but the subcontractors, having supplied the engineer with the fireman furnished, the plaintiff, while acting as brakeman, was injured by the negligence of such inexperienced acting engineer. It was held, that the subcontractors were independent contractors, and not servants of the construction company; that the crew furnished with the construction train were the servants of the subcontractors while engaged in the work; and that the subcontractors were liable to plaintiff for his injury; but that the construction company was not responsible therefor.

Negligence of Hands Loaned by Contractor to Subcontractor.—In *Ditberner v. Rogers*, 66 How. Prac. (N. Y.) 35, it is held, that hands loaned by a contractor to a subcontractor to move planks, etc., as required by the subcontractor, are not the contractor's employees while so engaged in the work, so as to make him responsible for injuries sustained through their negligence.

Contract to Unload Vessel—Injury to Stevedore's Employee.—In *Murray v. Currie* (Eng. Law Rep.), 6 C. P. 24, it appeared that defendant engaged a stevedore to unload his vessel; that the stevedore employed his own laborers, among whom was the plaintiff, and also Davis, one of defendant's crew, whom he paid, and over whom he had entire control, to assist them in unloading; that plaintiff,

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while engaged in the work, was injured through the negligence of Davis. It was held, that defendant was not responsible for the injury.

Railroad Construction Work—Defective Engine Furnished by Railroad—Injury to Railroad's Fireman.—But where a railroad company furnishes to a contractor engaged in constructing an extension of the company's railroad, an engine and train, upon which a fireman already in the service of the company is, by it, ordered to work, the company is liable for personal injuries to him, caused while obeying this order, by defects in the engine attributable to the railroad's negligence, although the track of the extension in progress is in possession of the contractor, and the operation and movements of the train thereon are under the latter's exclusive control. So held in *Savannah, etc., R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82.

6. SUBCONTRACTOR'S ACTS—LIABILITY OF CONTRACTOR'S EMPLOYER.

Neither is the contractor's employer responsible for the acts or omissions of a subcontractor employed by the former. *Parker v. Waycross & Florida R. Co.*, 81 Ga. 387, 8 S. E. 871; *Callahan v. Burlington, etc., R. Co.*, 23 Iowa 562; *Baumeister v. Markham*, 101 Ky. 122, 39 S. W. 844.

Contract to Supply Railroad Cross Ties—Trespasses Committed by Subcontractors' Employees.—A railroad company was not liable for acts of trespass committed by the employees of subcontractors of the person who contracted with the company to supply cross ties, there being no evidence that it authorized or ratified the trespasses. So held in *Parker v. Waycross & Florida R. Co.*, 81 Ga. 387, 8 S. E. 871.

Contract to Construct Railroad—Subcontractor's Trespasses on Adjacent Lands.—Where a railroad company yields possession of its premises to a company which contracts to build a railroad thereon, and the latter company lets the contract to a third party, such third party is an independent contractor, and the first company is not liable for trespasses committed by the third party on adjacent lands; and it is immaterial that the work is to be done subject to the approval of the first company's engineer. So held in *Alabama Midland R. Co. v. Martin & Bro.*, 100 Ala. 511, 14 So. 401.

Contract Sublet with Consent of Railroad—Right to Require Contractor to Discharge Incompetent Employees—Relation between Railroad and Subcontractor's Employees—Explosion Caused by Incompetent Employee When Engaged in Work Unauthorized by Railroad and Foreign to Contract.—In *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17, it appeared that defendant railroad company contracted with F. & Co. for the grading of their roadbed; that, with the consent of the company, F. & Co. subcontracted the rock excavation with S.; that, before the subcontract was made, it was understood by the contractors and by the officers of the company, that the rock would be removed by S. by blasting with nitro-glycerine; that a magazine for storing the nitro-glycerine necessary for that purpose was located on the company's land, under the direction of their engineer; that by the contract between the company and F. & Co., the contractors were forbidden to sublet without the company's consent, and were required to discharge incompetent and disorderly workmen, when required to do so by the company's engineers; that S., without the knowledge or consent of the company, stored in the magazine certain cans of glycerine which belonged to the United States Blasting Company, and which he kept there for sale on the orders of the blasting company; that an order for glycerine being sent to S. by the blasting company, his foreman directed B., one of his employees, to fill the order; that B., in doing so, removed one of the blasting company's cans from the magazine, a distance of one hundred and fifty yards, but not off the railroad's lands, and there, by his negligence, an explosion occurred, by which the deceased was killed; that

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B. was employed by S. specially to take charge of the nitro-glycerine in the magazine, and was an incompetent person for the business. It was held, that the stipulations in the contract between the railroad company and the contractors, as to subcontracting and the removal of incompetent employees, did not create the relation of master and servant between the railroad company, or F. & Co., and the servants of the subcontractor; nor raise a duty for the nonperformance of which an action could be maintained by third persons against the railroad company, or F. & Co., for injuries resulting from the negligence of an employee of the subcontractor; that the permission of the company that S. might use its lands for a magazine in which to store oil necessary for the operation of blasting on the work, did not authorize him to use them for the purpose of engaging in a traffic in oil belonging to others; that the company was not liable for injuries to third persons from the negligence of a servant of S. in the management of the nitro-glycerine, which belonged to another company, engaged in the manufacture of that article, and which had been clandestinely stored in the magazine by S., and was kept by him for sale on the orders of its owners, without the knowledge of the company.

7. SERVANT OF CONTRACTOR INJURED—LIABILITY OF EMPLOYER.

a. General Rule.

The rule exempting the employer from liability is, of course, applicable where the contractor's employee is injured by reason of the contractor's negligence or other misconduct.

Illinois.—*West v. St. Louis, etc., R. Co.*, 63 Ill. 545.

Iowa.—*Callahan v. Burlington, etc., R. Co.*, 23 Iowa 562.

Kansas.—*St. Louis, etc., R. Co. v. Willis*, 38 Kan. 330, 33 Am. & Eng. R. Cas. 397, 16 Pac. 728.

Louisiana.—*Camp v. Church Wardens, etc.*, 7 La. Ann. 321; *Gallagher v. Southwestern Exposition Ass'n*, 28 La. Ann. 946.

Minnesota.—*Schip v. Pabst Brewing Co.*, 64 Minn. 22, 66 N. W. 3.

New York.—*Cullom v. McKelvey*, 26 N. Y. App. Div. 46, 49 N. Y. S. 669; *Larock v. Ogdensburg, etc., R. Co.*, 33 N. Y. Sup. Ct. Rep. 382; *Murphy v. Altman*, 28 N. Y. App. Div. 472, 51 N. Y. S. 106.

Pennsylvania.—*Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475.

Virginia.—*Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. 163.

Neither the rule of respondeat superior, nor that of *qui facit per alium, facit per se*, applies as between an employer and the servants of an independent contractor. So held in *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. 163.

Grading Railroad—Contractor's Employee Injured by Stone Struck by Train.—A railroad is not liable to the employee of an independent contractor, engaged in raising the company's roadbed and track, for personal injuries received by him from being struck by a stone, which had rolled from the pile of dirt which was being used in the work in which plaintiff was engaged, lodged upon the tracks, and was knocked against plaintiff by a passing train. So held in *Reilly v. Chicago, etc., R. Co. (Iowa)*, 10 R. R. R. 418, 33 Am. & Eng. R. Cas., N. S. 418, 98 N. W. 464.

Contract to Construct Freight House—Poisonous Mixture to Prevent Decay of Timber—Injury to Workman.—In *West v. St. Louis, etc., R. Co.*, 63 Ill. 545, it appeared that the defendant railroad company contracted with certain parties to construct its road and appurtenances; that the contractors hired plaintiff to work upon a freight house they were building for the railroad; that a poisonous mixture was applied to the timber to prevent decay, and that plaintiff was injured by breathing exhalations of this substance, and by handling the timber to which it had been applied. It was held, that the railroad was not liable for the injury.

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Construction of Railroad Trestle—Defective Tool—Injury to Contractor's Employee.—A contractor engaged with defendant railroad to perform all the work of constructing a pile of timber trestlework across a lake for a stipulated price. H. was employed as a carpenter upon the work by one acting under the contract, and was injured because of a defective tool furnished by his immediate employer. It was held, that the railroad was not liable for his injuries, it not having furnished, or agreed to furnish, any tools. *Omaha Bridge Terminal Co. v. Hargadine* (Neb.), 13 R. R. R. 827, 36 Am. & Eng. R. Cas., N. S., 827, 98 N. W. 1071.

Grading Railroad Right of Way—Fall of Bank of Earth—Injury to Employee of Subcontractor.—Where a railroad company procured a right of way and contracted with an independent contractor for the grading of the same, it was not liable for injury to a day laborer, hired by one to whom the contractor had sublet a portion of the grading, caused by the falling of an overhanging bank of earth while the laborer was shoveling earth into a car. So held in *Boyd v. Chicago & N. W. R. Co.* (Ill.), 20 R. R. R. 154, 43 Am. & Eng. R. Cas., N. S., 154, 75 N. E. 496.

Contractor's Employee Killed—Negligent Speed of Construction Train—Trainmen Paid by Railroad.—In *Miller v. Minnesota & N. W. R. Co.*, 76 Iowa 655, 39 N. W. 188, it appeared that a contractor agreed to lay defendant's track at the rate of a certain number of miles per month, defendant "to furnish all motive power and cars, and operate the construction trains;" and that one of the contractor's employees was killed by the too rapid running of a construction train. It was held, that defendant was not liable, because, from the nature and terms of the contract it did not have control of the construction trains, though the trainmen were retained on its payroll and received their wages from it.

Injury to Employee on Construction Train—Negligence of Engineer.—Where the work of constructing a railroad has been entrusted to an independent contractor, who employs and discharges his own assistants and workmen, being responsible to the company only for the performance of his contract, he alone is liable for personal injuries to an employee on a construction train caused by the negligence of the engineer in charge of the train. So held in *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94, 40 Am. & Eng. R. Cas. 559.

Injury to Employee of Master Mechanic—Negligence of Another Master Mechanic in Furnishing or Using Tackle.—A person who employs a master mechanic to do certain work under his agent's general direction, each to furnish the men, tools and tackle necessary for his work, is not, in the absence of negligence in their selection, liable for an injury resulting to a servant employed by one master mechanic through the negligence of another master mechanic in furnishing imperfect tackle, or in the manner of using it. So held in *Harkins v. Standard Sugar Refinery*, 122 Mass. 400.

Continuing Contract to Do Carpentry on Building—Injury to Contractor's Employee.—In *Dane v. Cochrane Chemical Co.*, 164 Mass. 453, 41 N. E. 678, it appeared that A. was employed by B. under a continuing contract to do from time to time such carpentry as was necessary to be done on the building occupied by B. for manufacturing purposes, usually receiving his orders from B.'s superintendent; that A. hired the men to be employed in doing the work, superintended, paid and discharged them; that B. paid A. a certain sum a day for his work, and a further sum a day for each man employed by A. in addition to the amount of wages which A. agreed to pay the men; that A. and B. settled the accounts between them monthly, and A. paid his workmen weekly, but their names never appeared on B.'s pay roll; and that C., while employed by A. on B.'s premises, was injured by the act of another of A.'s workmen, and brought an action against B. under the employers' liability act, Mass. St. 1887, c. 270.

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It was held, that the relation of employer and employee did not exist between B. & C. and that the action could not be maintained.

Construction of Building—Injury to Employee—Negligence of Another Contractor.—The owner of a building in course of construction is not responsible for an injury sustained by the employee of one contractor through the negligence of another contractor. So held in *Murphy v. Altman*, 28 N. Y. App. Div. 472, 51 N. Y. S. 106.

Construction of Building—Injury to Contractor's Employee—Competency of Contractor.—In *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475, it is held, that where one employs an independent contractor to construct a building, the contractor is the principal of those whom he employs, and it is for them to inquire into his character for skillfulness and carefulness, and the employer is not a guarantor for his skill and care.

Demolition of Building—Overweighting of Floor—Death of Contractor's Employee.—In *Cullom v. McKelvey*, 28 N. Y. App. Div. 46, 49 N. Y. S. 669, it is held, that the owner of an old building, who has contracted with independent contractors for its demolition, is not liable in damages for the death of an employee of the contractors who is killed by the collapse of the building caused by the overweighting of one of its floors with brick through the negligence of the contractors or their servants.

Demolition of Building—Knowledge of Contractor's Incompetency—Injury to Contractor's Employee.—In *Schip v. Pabst Brewing Co.*, 64 Minn. 22, 66 N. W. 3, it appeared that the owner of an old building engaged an independent contractor to tear it down; that the owner, when he let the contract, knew that the work was dangerous, and the contractor was incompetent personally to superintend the same; and that, by reason of the contractor's incompetency, his servant was injured while engaged in the work. It was held, the owner of the property was not liable to the injured servant.

Failure to Shore Roof of Coal Mine in Possession of Contractor—Royalty—Injury to Laborer.—In *Smith v. Belshaw*, 89 Cal. 427, 26 Pac. 834, an action for negligence in suffering the roof of a drift in a coal mine to remain without support, by reason whereof a portion of the roof fell upon and injured the plaintiff, who was a laborer in the mine, where it appears that at the time of the accident, and for some months prior thereto, the mine was in the exclusive possession and control of a third party, under a contract with the owner; and that under the terms of such contract the contractor employed and paid the workman, and had entire charge of and authority over the mine, receiving a certain royalty for the coal taken from the mine, the owner is not liable for the alleged negligence.

Wrongful Employment of Infant to Mine Ore—Liability for His Death.—The wrongful employment of an infant by an independent contractor, to mine ore for the owners of a mine, does not render the mine owners liable to the infant's parents for his death. So held in *Harris v. McNamara*, 97 Ala. 181, 12 So. 103.

Removal of Ore—Means of Protecting Workmen Reserved.—But where a mining company contracting for the removal of ore reserves to itself such arrangements as are necessary for the protection of workmen, it is liable for such injuries as happen to employees of the contractors without the fault of the employees. So held in *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, 33 Am. Dec. 423.

Liability of Contractor.—The principle upon which the superior, who has contracted with another, exercising an independent employment, for the doing of the work, is exempt from liability for the negligence of the latter in the execution of it, applies as between the contractor and his subcontractor. So held in *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17.

Building Contract—Blasting—Subcontractor's Negligence.—In *French v. Vix* (C. P. N. Y.), 21 N. Y. Supp. 1016, it is held, that work of which blasting forms an essential part is not, merely for

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that reason, dangerous in itself, but the danger is created by the manner in which the work is done, and, therefore, contractors for the erection of a building are not liable for injuries caused by an independent subcontractor's negligence in blasting rock in the excavation of the building, in the absence of any proof that the contractors themselves were negligent.

Construction of Railroad Bridge—Negligence of Subcontractor in Erecting and Guarding Scaffold—Injury to Pedestrian.—In *Knight v. Fox*, 5 Exch. (Eng.) 721, it appeared that a railroad company entered into a contract with a person to construct a portion of its line; that the latter contracted with A., who lived in the country, to erect a bridge on the line; that A. had in his employ B., who acted as his general servant and as a surveyor, and had the management of A.'s business in London, for which he received an annual salary; that A. entered into a contract with B., by which B. agreed for a certain sum to erect a scaffold, which had become necessary in the building of the bridge, but it was agreed that A. was to provide the necessary materials, and lamps and other lights. The scaffold was erected upon the footway by B.'s workmen, and a portion of it improperly projected, and, owing to that and the want of sufficient light, a pedestrian fell, over it at night, and was injured. It was held, that A. was not responsible.

Fixing Gas Fittings—Negligence of Subcontractor—Explosion of Gas—Personal Injuries.—In *Rapson v. Cubitt* (Eng.), 9 M. & W. 710, it appeared that defendant, a builder, was employed by the committee of a club to execute certain alterations at the club house, including the preparation and fixing of gas fittings; that he made a subcontract with B., a gas fitter, to execute this part of the work, and, in the course of doing it, through B.'s negligence, the gas exploded, and injured plaintiff. It was held, that defendant was not liable in case for the injury.

b. Defective Appliances or Unsafe Premises of Employer.

But the employer may be liable for injuries to the servant of the contractor because of his failure to have the premises upon which the work is to be done in a safe condition.

Iowa.—*Neimeyer v. Weyerhaeuser*, 95 Iowa 497, 64 N. W. 416.

Maine.—*Mayhew v. Sullivan Mining Co.*, 76 Me. 100.

Massachusetts.—*Curley v. Harris*, 93 Mass. 112.

Minnesota.—*Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164, 13 N. W. 499.

Missouri.—*Burnes v. Kansas City, etc., R. Co.*, 129 Mo. 41, 31 S. W. 347; *Horner v. Nicholson*, 56 Mo. 220.

Ohio.—*Kelly v. Howell*, 41 Ohio St. 438.

Wisconsin.—*Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418.

Unsafe Tools or Appliances.—And the employer may be liable for injuries to the contractor's employees because of his negligence in furnishing the contractor unsafe or improper tools and appliances with which to perform the contract work. *The Rheola* (C. C.), 19 Fed. Rep. 926; *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82; *Conlon v. Eastern R. Co.*, 35 Mass. 195, 15 Am. & Eng. R. Cas. 99; *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. 1112; *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418.

Contract to Work in Mill—Defects in Machinery—Contractor's Employee Injured.—In *Neimeyer v. Weyerhaeuser*, 95 Iowa 497, 64 N. W. 416, it is held, that a mill owner, who, retaining the charge of the running of the machinery in his mill, contracts with another to do the manual labor, knowing that such person will have to employ others, will be liable for injury to any employee of the contractor from defects in such machinery.

Contract to Paint Iron Trolley Poles—Contractor's Employee Injured by Electric Shock.—In *Smith v. Twin City Rapid Transit Co.* (Minn.), 112 N. W. 1001, it is held, that a street railway company,

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which contracts with an individual for the painting of the iron poles used by it to support the wires connected with its overhead trolley system, the wires being so arranged and insulated as, when in proper repair, to prevent the iron caps on top of the poles from being charged with electricity, is liable for injuries occasioned to an employee of the contractor who, while engaged in painting the caps on one of the poles, receives a charge of electricity from the cap, which had become charged because of the negligent failure of the company to maintain its appliances in proper condition and repair; and that, as the dangerous condition was not due to any act of the contractor or his employee, but to the negligence of the company alone, it was immaterial whether or not the contractor was an independent contractor.

Contract to Build Railroad Culvert—Defective Derrick—Third Person Injured.—In *Conlon v. Eastern R. Co.*, 135 Mass. 195, 15 Am. & Eng. R. Cas. 99, it appeared that a railroad corporation made contract with a person to build a culvert under a highway alongside of its railroad; that, by the terms of the contract, the corporation furnished a derrick for use in the work; that the derrick, while in use in the highway, fell in consequence of the parting of a guy, which was old and obviously defective when the derrick was delivered by the railroad to the contractor; and that by the fall a person, other than a servant of the contractor, was injured. It was held, that these facts would warrant the jury in returning a verdict against the railroad company.

Contract to Do Certain Work in Mine—Failure of Owner to Furnish and Put Up Roof Props—Contractor's Employee Injured.—In *Kelly v. Howell*, 41 Ohio St. 438, it appeared that a contractor agreed with the owners of a mine to do certain work therein, the owners engaging to furnish and put up such props or supports for the roof of the mine as would render the mines secure, whenever notified by the contractor that they were necessary. It was held, that, although such notice from the contractor may not have been received by the owners, the owners, if they had actual knowledge that such supports were necessary, were liable in damages to an employee of the contractor, who had been injured, while at work in the mine, through the want of such supports for the roof.

Contract to Construct Apparatus in Building—Defective Plank Used in Staging—Negligence of Owner—Contractor's Employee Killed.—In *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418, it appeared that by a contract with the defendant company, another company was to construct and place certain apparatus in a building, and defendant was to furnish the staging needed in performing the work; and that through defendant's negligence, a defective plank was used in such staging, and by reason thereof an employee of the other company was killed. It was held, that defendant was liable for the death, although there was no privity of contract relation between it and deceased, on the ground that it had impliedly invited him to use such staging, and also on the ground that the negligent use of the defective plank was an act imminently dangerous to human life.

Injury to Employer's Servant—Defective Structure.—And where a manufacturing company employs a man to unload cars and he employs his own helpers, he is not an independent contractor as to one in the employ of the company who is injured by a defective structure which it was the company's duty to keep in a safe condition. So held in *Foster v. National Steel Co. (Pa.)*, 65 Atl. 618.

Unloading Vessel—Defective Tackle Furnished by Vessel—Stevedore's Employee Injured.—But in *Riley v. State Line Steamship Co.*, 29 La. Ann. 791, 29 Am. Rep. 249, it is held, that the owners of a vessel are not liable to the employee of a stevedore, who had full charge of the unloading of the vessel, for injury to such employee caused by defective tackle furnished by the vessel, where it was shown that the

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tackle had no apparent defect, and that the stevedore was an experienced and competent one, who had the exclusive employment of his laborers, and control of the work.

Contractor's Servant Injured—Implements and Materials Furnished by Railroad.—And a railroad company is not liable for injuries sustained by laborers in the employ of a contractor who was working for the company, merely because it furnished implements and materials for the performance of the work. So held in *Central R. & B. Co. v. Grant & O'Hara*, 46 Ga. 418.

Contract to Operate Mine—Failure of Owner to Designate Supervisor of Repairs—Miner Injured.—And in *Samuelson v. Cleveland Iron Min.*, 49 Mich. 164, 13 N. W. 499, it appeared that the owner of a mine contracted with certain persons to work it, but stipulated that the contractors and not the owners should be responsible for any injuries to workmen, and this responsibility was assumed by the contractors; that the mine was in proper condition when the contractors took possession, and there was nothing in the contract to lead workmen to suppose that the owner retained control of it or was responsible for their protection, unless it was a stipulation that when the contractors repaired the mine, the work should be done under the supervision of a person designated by the owner. It was held, that this stipulation was merely for the protection of the owner; and that his neglect to exercise his rights under it was not a legal wrong to others; and that, therefore, he was not liable for injury to a miner.

Contract to Unload Vessels—Failure to Inspect and Repair Derrick.—So in *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37, it appeared that D. contracted with defendant to unload from vessels on to cars all the railroad's iron brought to a certain dock for a specified time and for a specified price, defendant to furnish a derrick suitable and safe at the time for use; that plaintiff was employed by D. to assist, and was injured by a fall from the derrick. It was held, that defendant was not responsible for the negligence of D. in failing to inspect and repair the derrick.

8. DUTIES IMPOSED BY CONTRACT ARE NOT TRANSFERABLE.

Where one has entered into a contract which imposes certain duties upon him, he cannot escape liability for their nonperformance by employing an independent contractor.

England.—*Francis v. Cockrell*, 5 Q. B. 184.

United States.—*Robbins v. Chicago City*, 4 Wall. (U. S.) 657; *St. Paul Water Company v. Ware*, 16 Wall. (U. S.) 566; *Texas & P. R. Co. v. Juneman (C. C. A.)*, 71 Fed. Rep. 939, 18 C. C. A. 394; *The Magdeline*, 91 Fed. Rep. 798.

Missouri.—*Herdler v. Buck's Stove & Range Co.*, 136 Mo. 3.

New York.—*Fox v. Buffalo Park*, 21 N. Y. App. Div. 321, 47 N. Y. S. 788; *Weber v. Buffalo R. Co.*, 20 N. Y. App. Div. 292, 47 N. Y. S. 7.

Pennsylvania.—*Trainor v. Philadelphia & Reading R. Co.*, 137 Pa. St. 148, 20 Atl. 632.

Safe Work Place—Master's Duty.—The duty of a master to provide his servant a reasonably safe place in which to work cannot be delegated to an independent contractor, so as to relieve the master from responsibility for an injury resulting from his neglect. So held in *Trainor v. Philadelphia & Reading R. Co.*, 137 Pa. St. 148, 20 Atl. 632.

Master's Duty to Keep Railroad Tracks and Yards in Safe Condition.—A railroad company is required to keep its tracks and yards in a reasonably safe condition for its employees, and it cannot relieve itself from liability for the consequences of the nonperformance of such duty by delegating it to an independent contractor. So held in *Burnes v. Kansas City, etc., R. Co.*, 129 Mo. 41, 31 S. W. 347.

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Servant Working in Unsafe Place Injured through Negligence of Contractor.—In *The Magdeline*, 91 Fed. Rep. 978, it appeared that a hand was employed by a ship to do certain work in the hold, in a place where there was danger of injury from objects falling through openings in the deck above, where others were at work, from which danger he could not protect himself. It was held, the hand was not furnished a safe place to work, and the master was liable for an injury so received, though the negligence of an independent contractor engaged in other work upon the deck in permitting the object to fall which inflicted the injury.

Contract to Put New Roof on Building—Tenant's Goods Exposed to Rain.—In *Sulzbacher v. Dickie*, 51 How. Prac. Rep. (N. Y.) 500, it is held, that where the owner of a building enters into a contract with a builder to put a new roof upon his building at a stipulated price; and during the time of putting on such new roof and after the removal of the old one, while the building is in an exposed condition, the goods of a tenant or subtenant are damaged by rain, the owner is answerable for the damage, and not the contractor.

In *Werthheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824, it is held, that where a landlord, though not required by the lease to make repairs, undertakes at the request of his tenant to put a new roof upon the leased building, if injury occurs to the tenant's property in the building from rain through the uncovered roof, the landlord cannot escape liability therefor on the ground that it resulted from the failure of the persons who had undertaken the job, as independent contractors, to exercise reasonable care to avoid such injury.

Building for Viewing Exhibition—Injury to Patron from Negligent Construction.—In *Francis v. Cockrell*, 5 Q. B. (Eng.) 184, it is held, that where a man causes a building to be erected for viewing a public exhibition, and admits persons on payment of money, he cannot escape liability for injuries sustained by one of such persons because of the negligent construction of the building by proving that it was erected for him by an independent contractor.

9. INJURIES FROM ACTS CALLED FOR BY THE CONTRACT.

a. General Rule.

The employer is liable for injuries to third persons if they result directly from acts of an independent contractor which the contract expressly called for, or which were absolutely necessary to the performance of the contract, and not purely collateral to it and arising indirectly in the course of its performance.

England.—*Pickard v. Smith*, 10 C. B., N. S. (Eng.), 470.

United States.—*Chicago City v. Robbins*, 2 Black (U. S.) 419; *Fowler v. Saks*, 7 Mackey (D. C.) 570; *M'Namee v. Hunt*, 87 Fed. Rep. 298, 30 C. C. A. 653; *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.) 566; *Ware v. St. Paul Water Co.* (D. C.), Fed. Cas. No. 17,172.

Alabama.—*Chattahoochee, etc., R. Co. v. Behrman*, 136 Ala. 508, 53 So. 132.

Georgia.—*Atlanta & Florida R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277.

Illinois.—*Capital Electric Co. v. Hauswald*, 78 Ill. App. 359; *Daegling v. Gilmore*, 49 Ill. 248; *Florsheim v. Dullaghan*, 58 Ill. App. 593.

Iowa.—*Callahan v. Burlington, etc., R. Co.*, 23 Iowa 562.

Kentucky.—*James v. McMinimy*, 93 Ky. 471, 20 S. W. 435; *Matheny v. Wolffs*, 63 Ky. 137.

Maryland.—*City & S. R. Co. v. Moores*, 80 Md. 348, 30 Atl. 643.

Massachusetts.—*Connors v. Hennessey*, 112 Mass. 96.

Michigan.—*McDonnell v. Rifle Boom Co.*, 71 Mich. 61, 38 N. W. 681; *Skelton v. The Fenton Electric Light, etc., Co.*, 100 Mich. 87, 58 N. W. 609.

Missouri.—*Horner v. Nicholson*, 56 Mo. 220; *Lancaster v. Con-*

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necticut Mutual Life Ins. Co., 92 Mo. 469, 5 S. W. 23; *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. 416; *Ullman v. Hannibal & St. Jo. R. Mo.*, 67 Mo. 118; *Wiggin v. St. Louis*, 135 Mo. 553. 37 S. W. 109; *Williamson v. Fischer*, 50 Mo. 198.

Nebraska.—*Palmer v. City of Lincoln*, 5 Neb. 136, 25 Am. Rep. 479

New Hampshire.—*Stone v. Cheshire R. Corp.*, 19 N. H. 427, 51 Am. Rep. 192.

New Jersey.—*Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17.

New York.—*Congreve v. Morgan*, 12 N. Y. Sup'r Ct. 495; *Gilbert v. Beach*, 11 N. Y. Sup'r Ct. 423; *Johnston v. Phoenix Bridge Co.*, 44 N. Y. App. Div. 581, 60 N. Y. S. 947; *Ryder v. Thomas*, 13 Hun (N. Y. Sup. Ct.) 196; *Sulzbacker v. Dickie*, 51 How. Prac. Rep. (N. Y.) 500; *Vanderpool v. Husson*, 28 Barb. (N. Y.) 196.

Ohio.—*Carman v. Steubenville & Indiana R. Co.*, 4 Ohio St. 399; *Circleville v. Neuding*, 41 Ohio St. 465; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269.

Texas.—*Houston, etc., R. Co. v. Van Bayless*, 1 White (Tex. Civ. App.), 500.

West Virginia.—*Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin.—*Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Whitney v. Clifford*, 46 Wis. 138, 49 N. W. 835.

Collateral Negligence.—The general rule is, that where there is an independent contractor, or one who reserves the general control over the work, with the right to direct what shall be done, and the manner of doing it, the quasi employer, or contractee, is not liable for an injury resulting from the negligence of such contractor or his servants, collateral to the work contracted to be done, such work not being a nuisance per se. So held in *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630.

b. Illustrations.

Improvement of Canal—Trespasses.—A canal company, which, for the purpose of raising and otherwise improving its canal, caused the top soil of the land along the side of the canal to be plowed up and scraped away by a contractor who was employed by an agent of the company to do that specified work, is liable to the owner of the land for the damage resulting therefrom. So held in *Williams v. Fresno C. & I. Co.*, 96 Cal. 14, 30 Pac. 961.

Construction of Railroad Bridge—Failure to Remove "Sight-pile" Placed for Convenience of Railroad—Injury to Vessel.—In *Philadelphia & Havre De Grace Steam Tow-Boat Co. v. Philadelphia, W. & B. R. Co.* (D. C.), Fed. Cas. No. 11, 85, it appeared that the defendant railroad company had contracted with certain parties for the construction of a bridge across a navigable river; that the contractors, at the request and for the convenience of defendant's engineers, had driven in the bed of the river a "sight-pile," upon which a steam tug boat ran, and was damaged. It was held, that the negligence of the contractors and engineers in not removing the "sight-pile" was the negligence of the railroad company, as the "sight-pile" was placed in the river for the use and convenience of defendant's engineers and by their direction, and not placed by the contractor in the execution of his contract for the building of the bridge.

Insufficient Size of Sewer Pipe—Nuisance.—If a particular size of sewer pipe was placed at a certain point by the contractor, by direction of the railroad company or according to the specifications in the contract for the construction of the railroad, and this part of the plan was inherently defective, and a nuisance was thus caused, the railroad would be liable for the injury thereby sustained; but if the railroad did not direct such pipe to be placed, and the contract specifications did not require it, and it was so placed by the contractor according to his own judgment, and negligently, the railroad would

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not be liable, although it had notice from the party subsequently injured thereby that, in his opinion, the pipe was too small. So held in Atlanta, etc., *R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277.

Railroad Construction Contract—Excavations in Streets Made by Subcontractor—Injury to Property.—When injury is done to adjacent property by excavations in the streets made for railroad purposes, an action for damages lies against the railroad company, and the construction company which undertook to build the road, although the work was in fact done by a subcontractor; and it is not necessary to show that, in the performance of the work, he conformed to the grade fixed by the railroad engineers. So held in Alabama *Midland R. Co. v. Coskry*, 92 Ala. 254, 9 So. 202.

Street Grade Changed for Railroad Purposes by Subcontractor—Injuries to Property.—An action lies against the railroad company and the construction company who built the railroad, although the work was done by a subcontractor, in favor of the owner of property abutting on a public street, to recover damages for injuries caused by changing the grade of the streets for railroad purposes. So held in Alabama *Mid. R. Co. v. Williams*, 92 Ala. 277, 9 So. 203.

Contract to Clear Land—Escape of Fire.—A landowner is liable for the negligence of an independent contractor in permitting fire to escape to adjacent lands from lands which he has contracted to clear, where such negligence flowed directly from the acts which the contractor agreed to do, and was by the landowner authorized to do, and which was the natural and probable consequence of the performance of the work in the manner and time agreed upon. So held in *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386.

Construction of Drain from Cellar to Sewer—Making Openings in Barrier—Entrance of Tide Water—Injury to Adjoining Premises.—If a person employs a contractor to construct a drain from his cellar into the common sewer in the street, through a plank barrier which surrounds, beneath the surface of the street, the block of buildings in which the cellar is situated, and the work is so negligently and improperly done that, after it is finished, tide water flows through the opening made in the barrier and through the cellar into an adjoining cellar, the employer of the contractor is liable for the damage thereby caused. So held in *Sturges v. Theological Education Society*, 130 Mass. 414, 39 Am. Rep. 463.

Contract to Drive Logs in Stream—Injuries to Riparian Owners.—In *McDonell v. Rifle Boom Co.*, 71 Mich. 61, 38 N. W. 681, it is held, that where a boom company, having full control and management of a stream, contracts for driving logs therein; and the reasonable performance of the contract obliges the contractor to so run and manage the logs and water as to damage riparian owners, the boom company is liable for such damage.

Altering Old Building—Use of Old Wall—Inherent Defects—Injury to Employee.—In *Horner v. Nicholson*, 56 Mo. 220, an action for injuries sustained by an employee in making alterations in, and additions to an old building, it was held, that where the damages were shown to have resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building, or where the removal of floors and the construction of new walls were accomplished under the direction of the employer previous to the letting of the work to the contractors, and so unskillfully or negligently arranged as to have caused the injuries complained of, the employer will be liable, although at the time of the accident the work had been let out to a contractor and was being carried on under his management and control.

Excavation Contract—Negligence with Respect to Depth and Extent.—In *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. 416, it is held, that where the owner of property contracted for an excavation upon it by another "to such general depth" and "extent as may be indicated by the engineer" (or his agent) representing the

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owner, the latter is responsible for negligent acts of a subcontractor for such work, done under direction of the owner's agent, in respect to the depth and extent of the excavation.

Building Contract—Failure to Guard Excavations Near Sidewalk—Injuries to Pedestrians.—In *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528, it is held, that the fact that a building is being constructed by an independent contractor does not exempt the owner from liability for injuries to pedestrians arising from the neglect of the contractor to guard excavations adjacent to the sidewalk and required to be made by the contract for the building.

Construction of Building—Encroachment.—In *Williamson v. Fischer*, 50 Mo. 198, it is held, that where a contractor, under orders from his employer, attempted to erect a building having a width of sixty-five feet where the building space was but sixty-four feet, six inches, and, in so doing, encroached upon his neighbor's wall, the employer was a cotrespasser, and as responsible as though he himself had made the excavation.

Blasting—Injury to House on Same Stratum.—In *Brennan v. Schreiner* (Super Ct. N. Y.), 20 N. Y. Supp. 130, it is held, that where the owners of a lot contracted with another to excavate rock on their premises that formed part of the stratum on which plaintiff's house rested, and could not be blasted without injury to such house, they were not exempt from liability by such contract for injuries to the house resulting from blasting such rock, since the act itself was wrongful to plaintiff.

Grading Roadbed—Blasting—Injury to Premises from Repeated Concussions.—In *Booth v. Rome, W. & O. T. R. Co.* (N. Y. Sup. Ct.), 17 N. Y. Supp. 336, 63 Hun 624, it appeared that defendant railroad company had the right to make an excavation in which to lay its tracks, and also the incidental right to do all necessary blasting therefor; that plaintiff's adjoining premises were injured, not by any particular blast, but by repeated concussions. It was held, that evidence that the work of excavation and blasting had been let to an independent contractor was immaterial, on the issue of the railroad's liability, where the only testimony relating to the question showed that such contractor was specially employed to do such work, and that the parties knew that blasting would be necessary.

Construction of Elevated Railroad—Subcontract to Remove Surplus Foundation Material—Unguarded Obstruction on Sidewalk—Injury to Pedestrian.—In *Johnston v. Phoenix Bridge Co.*, 44 N. Y. App. Div. 581, 60 N. Y. S. 947, it is held, that where a corporation which has contracted to construct a section of an elevated railroad, and has undertaken to become responsible for all damages to persons or property "occasioned by the omission, neglect or carelessness of itself, its agents or employees, during the performance of the work," sublets a portion of the contract to subcontractors, who agree "to remove all the surplus excavation and other material used in the foundation work from the ground and to take your place under your contract with the Brighton Beach Co., above mentioned, for furnishing these foundations," the corporation is liable to a pedestrian who, while walking at night along the sidewalk of the street in which the work is being performed, sustains injuries by falling over an unguarded pile of earth excavated by the subcontractors and deposited by them upon the sidewalk, as such obstruction of the sidewalk is a direct and necessary incident of the subcontractors' undertaking, and is not purely collateral to the work.

Contract to Move House—Negligence—Injury to Horse.—Where the owner of a house made a contract with B. that the latter should, for a stipulated sum, remove it from one side of a street to the other side, and B. performed his work so negligently as to cause an injury to a horse plaintiff was driving, the owner of the property was liable for the injury. So held in *Wiswall v. Brinson*, 32 N. Car. 354.

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Railroad Construction—Blasting—Rocks Thrown against House.—In *Carman v. Steubenville & Indiana R. Co.*, 4 Ohio St. 399, it appeared that a railroad company agreed with certain contractors for the construction of a part of their road; that among other work provided for, was that of removing, at a stipulated price, solid rock, which, it was said in the contract, "must be removed by blasting;" that in removing the rock, without carelessness on the part of the contractors, a large quantity of fragments was thrown against the dwelling of an adjoining proprietor, causing an injury. It was held, that the contractors had done only what they were authorized to do by the company, and, as the company must be held to have assented to the unlawful act, by which plaintiffs were injured, it was liable as a joint wrongdoer.

Contract for Construction of Railroad—Negligent Construction of Crossing under Direction of Railroad's Engineer—Person Killed by Train.—In *Dublin v. Taylor, B. & H. R. Co. (Tex.)*, 13 Am. & Eng. R. Cas., N. S., 461, it appeared that plaintiff's decedent was killed by a train on a railroad, which had not been accepted by nor delivered to defendant railroad company by the contractors for its construction. The accident was the result of negligence in the construction of a crossing at a point where the railroad intersected a private road which had been traveled by the public for a number of years. Under the contract between the railroad and the contractors, all roads recognized as such by defendant's engineer, when crossed by the railroad, had to be kept in condition for public use by the contractors, until the completion of the railroad, and such engineer was with the construction gang during all the time the railroad was being built. It was held, that if such engineer directed the work to be done at the place where the accident occurred, or designated it as the place at which the crossing should be made, then the construction of the crossing was the act of the railroad company, and not that of independent contractors, and the company was liable for damages resulting from the improper construction of the crossing.

Contract to Grade Street for Owner of City Addition—Supervision of City Engineer—Overflow of "Mushy" Earth—Injury to Property.—In *Koch v. Investment Co.*, 9 Wash. 405, 37 Pac. 703, it is held, that although the principal owner of an addition to a city has been authorized to grade a street therein to the established grade, under the supervision of the city engineer, and has let a contract for the entire work under similar terms and stipulations as the city employed in contracts for street improvements, such owner is liable for the damage resulting to a residence lot from the overflow of water, sand, gravel and debris thereon, when the contractors, with his knowledge, in making a fill across a ravine to bring the street to the established grade, have dumped therein large quantities of "mushy" earth, mixed with water, which would not bank up, but flowed away over the lands lying below the grade of the street.

c. Rule Held Not Applicable.

Contract to Dig Ballast for Roadbed—Negligent Operation of Steam Shovel—Horse Frightened—Person Injured.—In *Bailey v. Troy & Boston R. Co.*, 57 Vt. 252, 52 Am. Rep. 129, it appeared that plaintiff's horse was frightened at a steam shovel, and ran, throwing plaintiff out of his carriage, who thereby received the injury complained of; that the shovel was located on defendant's land, used to obtain gravel to ballast its roadbed, near the highway in which plaintiff was traveling. Defendant's evidence tended to show that the shovel was operated and wholly controlled by M., an independent contractor, and his servants, although its use was contemplated when the contract was made. And, the question being whether defendant or M. was liable, the court charged in effect, that defendant's liability was coextensive with that of M., if it was part of the agree-

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ment that the shovel should be used in doing the work. This was held error; that the work being lawful, and the shovel not a nuisance, until it became such by negligent use, the defendant was not liable, unless the relation of master and servant existed between it and those operating the shovel—unless it not only prescribed the end, but directed the means and methods.

Grading of Railroad—Clearing Right of Way of Waste Matter—Fire Started by Contractor.—In *Callahan v. Burlington, etc.*, R. Co., 23 Iowa 562, the petition alleged that the defendant railroad company contracted with W. & Co. for the grading of its road, reserving to itself the right of giving directions as to how it should be performed; that W. & Co. sublet the work to F.; that one of the specifications of the contract between defendant and W. & Co. was that the ground should be cleared of all perishable materials, which were to be removed or burned as the engineer of defendant might direct; that in the progress of the work, an engineer of defendant ordered an employee of F. to burn some rubbish that was on the line of grading, which was done by such employee, but in such a negligent manner that he permitted fire to escape, whereby a large amount of timber was destroyed. It was held, that such averments were insufficient to justify a recovery against defendant, as it did not appear that the loss necessarily occurred from the burning which was ordered by the defendant's engineer, but from the negligent manner in which it was done by the servant of the subcontractor.

Construction of Telegraph Line—Post Hole, Not Required by Contract, Dug in Street and Left Unguarded—User of Street Injured.—In *Hackett v. Western Union Tel. Co.*, 80 Wis. 187, 49 N. W. 822, it appeared that in the construction of a telegraph line for defendant, a post hole dug in a street was left unguarded at night, and plaintiff was injured thereby; and that the line was being built by a railroad company as an independent contractor, and it furnished all the materials and labor and employed the foreman who had full charge of the work; and that the contract did not require any holes to be dug in the street. It was held, that defendant telegraph company was not liable.

Railroad Construction—Unnecessary Embankment—Injury to Lot—Survey and Grade Made by Contractor.—In *Chattahoochee, etc.*, R. Co. v. *Behrman*, 136 Ala. 508, 35 So. 132, 7 R. R. 920, 30 Am. & Eng. R. Cas., N. S., 920, it is held, that a railroad company, which had nothing to do with the construction of its road further than to inspect and pay for the work after the same was completed, is not liable for injury to a lot by reason of the erection of an embankment in front of same, in the construction of the railroad by an independent contractor, who made the survey and fixed the grade for the railroad; and, in the construction of the railway, had the exclusive management and control of the work; the embankment not being called for by the contract or necessary for its performance.

Contract to Grade Railroad—Trespasses of Subcontractor.—In *Waltmeyer v. Wisconsin, I. & Neb. R. Co.*, 71 Iowa 626, 33 N. W. 140, 71 Iowa 626, it is held, that where subcontractors, in building the embankment of a railroad, go outside of the right of way to obtain earth for the embankment, the railroad company cannot be held liable for the trespass, unless it appears that it assented thereto, or had such knowledge of it at the time, or before it was done, that such assent might be presumed therefrom.

Contract to Saw Wood Along Railroad—Fire Spreading from Contractor's Cooking Car—Burning of Mill.—Defendant railroad company contracted to have its wood along the line of its railroad sawed in lengths suitable for fuel, at a stipulated price per cord. The contractor owned and used for the work the railroad cars, one for a living car for his men, one for a tool car, and one for a cooking car, in which a fire was kept for the purpose. To enable the contractor to do his work conveniently, defendant placed these cars on one of

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its spur tracks, about 100 feet from plaintiff's mill. It was held, that such act of defendant did not make it liable for the burning of the mill from fire kept by the contractor in his cooking car. *Leavitt v. Bangor & A. R. Co. (Me.)*, 7 Am. & Eng. R. Cas., N. S., 354.

10. POSITIVE LEGAL DUTIES CANNOT BE DELEGATED.

a. General Rule.

Nor can positive duties imposed by law be evaded by employing an independent contractor to perform them. For the latter's negligence or misconduct in respect to them, the employer will be responsible.

England.—*Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. (Eng.) 488; *Pickard v. Smith*, 10 C. B., N. S., 470.

United States.—*Chicago City v. Robbins*, 2 Black (U. S.) 419; *Fowler v. Saks*, 7 Mackey (D. C.) 570; *Texas & P. R. Co. v. June-man*, 18 C. C. A. 394, 71 Fed. Rep. 939.

Alabama.—*Montgomery St. R. Co. v. Smith (Ala.)*, 19 R. R. R. 131, 42 Am. & Eng. R. Cas., N. S., 131, 39 So. 757.

Georgia.—*Savannah v. Waldner*, 149 Ga. 316.

Illinois.—*City of Springfield v. Le Claire*, 49 Ill. 476; *Village of Jefferson v. Chapman*, 127 Ill. 438.

Kentucky.—*Baumeister v. Markham (Ky.)*, 101 Ky. 122, 39 S. W. 844; *Matheny v. Wolffs*, 63 Ky. 137.

Maine.—*Veazie v. Penobscot R. Co.*, 49 Me. 119.

Maryland.—*City & S. R. Co. v. Moores*, 80 Md. 348, 30 Atl. 643.

Massachusetts.—*Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482.

Michigan.—*Bay City, etc., R. Co. v. Austin*, 21 Mich. 390; *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722; *Wilkinson v. Detroit Steel and Spring Works*, 73 Mich. 405, 41 N. W. 490.

Missouri.—*Blake v. City of St. Louis*, 40 Mo. 569; *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. 31, 19 S. W. 308.

Nebraska.—*Omaha, etc., Co. v. Hargadine*, 13 R. R. R. 827, 36 Am. & Eng. R. Cas., N. S., 827, 98 N. W. 1071.

New York.—*Congreve v. Morgan*, 12 N. Y. Sup'r Ct. 495; *Dorrity v. Rapp*, 72 N. Y. 307; *McCamos v. Citizens' Gas Light Co.*, 40 Barb. (N. Y.) 380; *Ryder v. Thomas*, 13 Hun. (N. Y. Sup. Ct.) 196; *Deming v. Terminal R.*, 169 N. Y. 1, 61 N. E. 983; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Weber v. Buffalo R. Co.*, 20 N. Y. App. Div. 292, 47 N. Y. 7.

Ohio.—*Circleville v. Neuding*, 41 Ohio St. 465; *Clark v. Fry*, 8 Ohio St. 358; *Tawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049.

Oregon.—*McAllister v. City of Albany*, 18 Ore. 426, 23 Pac. 845; *Allen v. Willard*, 57 Pa. St. 374.

Tennessee.—*Mayor, etc., v. Brown*, 56 Tenn. 1.

Texas.—*Galveston, etc., R. Co. v. Yell*, 3 Will. (Tex. Civ. App.) 366; *Houston, etc., R. Co. v. Meador*, 50 Tex. 77; *Taylor, B. & H. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868.

West Virginia.—*Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

Where an employer owes certain duties to third persons or the public, he cannot relieve himself from liability by committing the work to a contractor. So held in *Montgomery St. R. Co. v. Smith (Ala.)*, 19 R. R. R. 131, 42 Am. & Eng. R. Cas., N. S., 131, 39 So. 757.

A duty to the public or an individual cannot be delegated to a contractor so as to exempt the employer from responsibility for injuries sustained by reason of the contractor's acts. So held in *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77.

The doctrine of the nonliability of the employer for the negligence of another because the latter is an independent contractor does not apply to relieve the former from liability for the omission of a duty imposed by law in behalf of the safety of the public. So held in *Carrico v. West Virginia Cent., etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571.

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b. Illustrations.

Post Holes in Street—Failure to Guard—Liability of Railway Company—Supervision and Approval of Company.—In *Donovan v. Oakland, etc., R. T. Co.*, 102 Cal. 245, 36 Pac. 516, it is held, that a railway company is liable for injury to a highway traveler caused by leaving unguarded in a public street post holes dug for the support of poles for its railway; and the fact that the holes were dug by contractors who had contracted for the digging of them, will not relieve the railroad company from liability for negligence, where the contract provided that they were to be dug under the supervision of the superintendent of the railroad company, and subject to his approval and acceptance, and did not require the contractors to guard the holes for the protection of travelers. See also, *Barry v. Terkildsen*, 72 Cal. 254, 13 Pac. 657.

Excavation upon Depot Grounds—Absence of Lights—Injury to Prospective Passenger.—Where an excavation was made upon the depot grounds of a railroad company by an independent contractor in the course of his work, and no barricade or light was left during the night to warn the public of the danger, and a person about to take passage on a train fell into the same, the railroad company and the contractor were jointly liable for the injuries sustained. So held in *Louisville, etc., R. Co. v. Cheatham (Tenn.)*, 100 S. W. 902.

Street Obstructed by Materials—Failure to Place Lights—Personal Injuries.—Where a municipal ordinance required the owner of any materials which formed an obstruction in its streets to prepare and place lights thereon before dark, the owner is liable for any injury that arises to third persons in consequence of the negligent performance of this duty, even though he had contracted for its performance by an independent contractor. So held in *Wilson v. White*, 71 Ga. 506.

Construction of Area—Excavation in Sidewalk—Insufficient Guards—Injury to Pedestrian.—The owner of a city lot, having, by permission of the city authorities, caused an excavation to be made in a sidewalk, for the purpose of constructing an area by the side of a building to be erected on the lot, it is his duty to see that proper protection against injury to persons passing along the sidewalk is provided; and if, in consequence of the excavation being insufficiently guarded, a passer on the sidewalk falls in and is injured, the lot at the time, for the purpose of constructing the area and erecting the building under a contract, being in the exclusive possession of an independent contractor, the owner of the premises is liable for the injury so received. So held in *Silvers v. Nerdlinger*, 30 Ind. 53.

Contract to Repair Bridge—Failure to Place Lights or Barriers—Liability of County.—Where a contractor employed by a county to repair a bridge negligently fails to place lights or barriers to warn travelers of danger, the county is liable for any injury resulting from such failure. So held in *Park v. Board of Commissioners of Adams County*, 3 Ind. App. 320.

Fall of Walls of Burned Building—Possession of Contractor—Injury to Property.—Where the owner of a house which has been burned leaves its walls in a tottering and unsafe condition, he is guilty of negligence, and is liable to an adjoining proprietor for damages resulting from the fall of the walls upon the buildings of the latter; and it is no defense to allege that the injury occurred while the premises were in the sole charge of a skillful contractor, under a contract to rebuild the house. So held in *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98.

Obstructing Highway—Duty to Protect Public.—A railroad company cannot, by any stipulations with contractors, relieve itself from its obligation to protect the public from danger, when it interferes with, or obstructs a public highway. So held in *Veazie v. Penobscot R. Co.*, 49 Me. 119.

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Construction of Railroad Across Highway—Failure to Replace Barriers—Injury to Traveler—Work Directed by Railroad.—In *Inhabitant's of Lowell v. Boston & L. R. Co.*, 40 Mass. 24, it appeared that the defendant railroad was authorized to construct its road across a highway, and in the progress of the work it became necessary from time to time to remove certain barriers, which were placed by the company across the highway for the protection of travelers, but were adopted by the town in which the highway was situated; and that in consequence of the neglect of the workmen to replace the barriers, at night, a traveler sustained an injury. It was held, that the railroad was responsible for the such neglect of the workmen, although they were employed by an individual who had contracted to construct that portion of its road, for a stipulated sum, the working being done by direction of the railroad company.

Contract to Lay Street Railway Track—Loose Rails Projecting Beyond Barrier—Injury to Pedestrian.—In *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482, it appeared that a street railway company employed a contractor to lay a new track in a city street, who so negligently enclosed the space where the track was being laid that the ends of rails lying there projected beyond the barrier into the street at a point where there was no crosswalk, and that a person crossing at such point fell over the ends of the rails and was injured. It was held, that the fact that work was being done by an independent contractor did not exonerate the street railway company from liability.

Erection of Rolling Mill Near Highway—Injury to User of Highway.—In *Wilkinson v. Detroit Steel and Spring Works*, 73 Mich. 405, 41 N. W. 490, it is held, the law imposes upon the proprietor of premises adjoining the highway when exercising the right of erecting a rolling mill thereon, the duty to the public to so erect such building as to render it reasonably safe with respect to those passing along the highway; and such duty cannot be delegated to an independent contractor, so as to exempt the proprietor from responsibility for its nonperformance.

Operation of Railroad under Contract with Owner—Failure to Erect and Maintain Fences.—In *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390, it is held, that a railroad corporation operating a railroad under a contract with the owner is an agent of the latter within the meaning of Mich. Comp. Laws, § 1987; and the neglect of such agent of the statutory duty to erect and maintain fences along the railroad will render the company owning the road liable for injuries resulting therefrom.

Construction Contract—Leaving Premises in Dangerous Condition or Injuring Adjoining Property.—The owner of property causing an improvement to be made thereon by a contractor who engages to do the work may be liable to third persons for injuries caused by the negligence of the contractor in leaving the premises in a dangerous condition, or so doing the act he is engaged to do as to injure third persons or adjoining property, and yet not be liable upon the contracts of the contractor, or for his failure to perform a contract duty to a workman in his employ. So held in *Omaha Bridge & Terminal Co. v. Hargadine (Neb.)*, 13 R. R. R. 827, 36 Am. & Eng. R. Cas., N. S., 827, 98 N. W. 1071.

Failure to Repair Bridge Connecting Two Houses—Injury to Tenant.—In *Brennan v. Ellis*, 70 Hun (N. Y. Sup. Ct.) 472, 24 N. Y. Supp. 426, it appeared that an apartment house and the second story of a building in its rear were connected by a bridge, which had become out of repair; and that in consequence of its defective condition a tenant in occupation of the premises, and entitled to make use of the bridge, fell through it and was injured. It was held, that the owner of the property was not exonerated by the fact that he, prior to the injury, had entered into an agreement with a contractor to repair the bridge, where the contractor failed to do the work.

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Contract to Lay Gas Pipes in Street—Negligence—Injury to Third Person.—Where a party, having obtained permission from the city to lay gas pipes in a street, makes a contract with another person to do the work, he is liable for the negligence of the servants of the latter, where it causes an injury to a third party. So held in *McCamos v. Citizens' Gas Light Co.*, 40 Barb. (N. Y.) 380.

Construction of Overhead Railroad Crossing—Failure to Guard Embankment in Highway—Injury to Highway Traveler.—In *Deming v. Terminal Ry.*, 169 N. Y. 1; 61 N. E. 983, it appeared that a railroad company was granted by statute authority to carry a public highway over its tracks, and that an independent contractor, to whom the entire work had been let, failed to properly guard an embankment made in the highway in the prosecution of the work, and a highway traveler was injured because of such neglect. It was held, that the railroad was liable for the injury, not under the rule of respondeat superior, but under the doctrine making it responsible for a breach of its nonassignable duty to the public to keep the highway in a safe condition for travel while the work was in progress.

Construction of Bridge Over Highway—Railroad Contracting to Perform State's Duties—Failure of Contractor to Safeguard Highway.—In *Weber v. Buffalo R. Co.*, 20 N. Y. App. Div. 292, 47 N. Y. S. 7, it is held, that where a railroad contracts with the state to perform the state's duty in its stead, and to pay all damages that may occur to the state or to individuals in consequence of the company's non-performance thereof, the railroad is not absolved from its duty in the premises to safeguard the public highway or approach to the bridge in question, which the railroad had undertaken to reconstruct, by reason of its having employed an independent contractor to perform the work under a stipulation that he would perform such duty.

Building Contract—Excavating Coal Vaults under Sidewalk—Duty to Guard.—In *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, it is held, that where the owners of a city lot, in the course of constructing a building thereon, make, by their own employees, an excavation in the adjacent sidewalk for coal vaults and an area, to be used in connection with the building, a duty devolves upon them to guard it with ordinary care; and this duty is not shifted from them by letting the work of building the area walls and constructing the coal vaults to an independent contractor, who is to furnish all the material as well as perform the labor necessary therefor.

Contract to Demolish Walls of Burned Building—Negligence—Injury to Property.—In *Covington & Cincinnati Bridge Co. v. Steinbrock* (Ohio), 55 N. E. 618, it appeared that the ruined walls of a building of defendant, partially destroyed by fire, were left standing, a menace to the public and to the property of others in the vicinity; that he was ordered by the inspector of buildings to take down the walls, and, for that purpose, employed a contractor to do the work for an agreed consideration, who stipulated that he would save defendant harmless for injuries to others in doing the work; and that one of the walls, by reason of the negligence of the contractor in doing the work, fell outward upon and injured plaintiff's property, situated across an alley from the wall. It was held, that defendant was liable for the injury.

Excavation in Street—Failure of Contractor to Guard—Liability of City.—In *McAllister v. City of Albany*, 18 Ore. 426, 23 Pac. 845, it is held, that a municipal corporation, upon whom its charter imposes the duty to keep its streets in a reasonably safe condition for travel, is liable to persons for injuries caused by neglect to keep proper lights and guards at night around an excavation which it has authorized to be made in the street, although it has provided in its contract for such precautions with the contractor.

Contract to Build House—Guards—Duty to Public.—Where a contract to build a house is split up into different contracts and the owner undertakes to supply the materials and no provision is made

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for the supervision of the work or maintaining guards, the duty is on the owner to protect the public. So held in *Homan v. Stanly*, 66 Pa. St. 464, 5 Am. Rep. 389.

Construction of Railroad—Failure to Place Cattleguards.—In *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77, it is held, that the duty of placing stockguards, etc., when constructing a railroad, is a duty due from the railroad company to the proprietors of the inclosures through which the road passes annexed by statute to the privilege granted the corporation; and for the failure to perform such duty a railroad company is liable though it resulted from the negligence of an independent contractor in the construction of the railroad.

Railroad Crossing—Negligence in Constructing.—In *Taylor, B. & H. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868, it is held, that a railroad company cannot delegate the statutory or common-law duty of making a crossing, so as to escape liability for the negligence of contractors in constructing it.

Construction of Railroad—Duties Owed to Passengers.—A railroad company cannot relieve itself from liability as to the condition and construction of its road by confiding duties, which it owes to passengers, to an independent contractor. So held in *Carrico v. West Virginia Cent., etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571.

Sewer Construction—Excavation—Failure to Guard—Liability of City.—In *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780, it is held, that where a dangerous excavation is made and negligently left open, without proper lights or other guards, in a street or sidewalk, by a contractor, under a contract with the city for building a sewer or other improvement, the city is liable to a person injured thereby, although it had no immediate control over workmen.

Sewer Construction—Failure to Guard—Subletting Prohibited—Negligence of Subcontractor.—In *Blake v. Thirst*, 2 Hurl. & C. (Eng.) 20, it appeared that plaintiff received an injury by a fall at night from the highway into an unfenced and unlighted sewer, which was being constructed under a written contract between defendant and certain local commissioners; that a clause in the contract prohibited subletting without the engineer's consent; that defendant contracted by parole with N., a competent workman, to do the excavation and brick work and the watching, lighting and fencing, at a certain price per yard; while he supplied the bricks, and carted away the surplus earth; that defendant's name was on the carts, and also on a temporary office near the works; that he did not interfere during the progress of the work, but admitted he should have dismissed N. if dissatisfied with the execution of the work; and that the clerk of the works was in the employment of the commissioners. It was held, that there was evidence for the jury of defendant's liability.

Contract to Construct Railroad Drawbridge—Defect in Construction—Vessel Detained.—In *Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. (Eng.) 488, it appeared that defendant railroad company was authorized by statute to construct a railroad bridge across a navigable river; that the act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge and for opening it to admit such vessel; that defendant employed a contractor to construct the bridge in conformity with the provisions of the statute; but, before the works were completed, the bridge, from some defect in its construction, could not be opened, and plaintiff's vessel was prevented from navigating the river. It was held, that the railroad company was responsible for the damage thereby caused plaintiff.

Refreshment Rooms and Coal Cellar at Railroad Station Let to Private Party—Coal Hole Left Open by Coal Merchant's Servant—Injury to Passenger.—In *Pickard v. Smith*, 10 C. B., N. S. (Eng.), 470, it appeared that refreshment rooms and a coal cellar at a railroad station were let by the railroad company to S., the opening for

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putting coal into the cellar being on the arrival platform; that a train coming in while the servants of a coal merchant were shooting coals into the cellar, a railroad passenger, while passing in the usual way, fell into such cellar opening, which the coal merchant's servants had left insufficiently guarded. It was held, that both S. and the railroad company could be held responsible.

Construction of Sewers—Contracts Let by City—Negligence—Personal Injuries.—But when the statute incorporating a city requires sewers to be constructed under contracts to be let by the city, the contractor, in performing the work, is not the agent or servant of the city; and any negligence in performing the work is his negligence, and the city is not liable for injuries sustained through such negligence. So held in *O'Hale v. Sacramento*, 48 Cal. 212.

11. DUTIES OF GRANTEE OF PUBLIC LICENSEE.

a. General Rule.

The obligations of one as the grantee of a public privilege or license cannot be transferred to an independent contractor, so as to exempt the grantee of the license from responsibility.

Georgia.—*Macon & Augusta R. Co. v. Mayes*, 49 Ga. 255.

Illinois.—*Chicago v. Murdock*, 212 Ill. 9, 72 N. E. 46; *Chicago & Rock Island R. Co. v. Whipple*, 22 Ill. 105; *Illinois Cent. R. Co. v. Finnigan*, 21 Ill. 646; *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796; *Rockford, etc., R. Co. v. Heflin*, 65 Ill. 366.

Maine.—*Veazie v. Penobscot R. Co.*, 49 Me. 119.

Michigan.—*City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Darmstaetter v. Moynahan*, 27 Mich. 188; *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 274.

New York.—*Deming v. Terminal Ry.*, 169 N. Y. 1, 61 N. E. 983.

Texas.—*Houston, etc., R. Co. v. Meador*, 50 Tex. 77.

b. Illustrations.

Contract to Lay Water Pipes in City—Excavation—Failure of Subcontractor to Guard.—In *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.) 566, it appeared that a corporation undertook to lay water pipes in a city, agreeing that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which may occur by reason of the neglect of their employees on the premises;" and that the corporation let the work out to a subcontractor, through the negligence of whose servants, injury resulted to a person passing over the street. It was held, that the corporation could be properly sued for damages.

Reconstruction of Party Wall—Repairs—Municipal Regulation.—In *Fowler v. Saks*, 7 Mackey (D. C.) 570, it is held, that where one is permitted by municipal regulation to remove and reconstruct a party wall on condition of making good all damages to the adjoining owner or his premises, he cannot shift the liability for resulting damage to the contractor who did the work.

Construction of Public Works—Authority to Take Materials—Compensation—Duty of Contractor to Furnish Materials.—Where a corporation is authorized by law to enter upon certain premises, and take therefrom material for the construction of public works by making compensation therefor, if the corporation afterwards contracts with others to do the work, who avail themselves of the authority given to take material, the company will be liable therefor, although the contractors were bound by their contract to furnish the material and do the work for a special price. So held in *Leshar v. Wabash Nav. Co.*, 14 Ill. 85.

Contract to Relay Street Railway—Stones Piled in Street—Failure to Guard.—A street railway company engaged in relaying its rails, by virtue of its charter and a special permit for that purpose from the city, is liable for injuries to its employees resulting from failure

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to guard against the consequences of piling paving stones in the street close to its tracks, even though the work is being done by an independent contractor. So held in *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796.

Use of Private Railroad in City—Duty to Comply with Conditions Imposed by City.—All persons using a railroad track put down in a public street by a party under a license given by the city upon stringent conditions to prevent accidents, and constructed for the convenience of such party's business, and to be lawfully used for no other purpose, are to be deemed its agents, and it is liable for their conduct. So held in *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 274.

Coal Chute in Sidewalk—Municipal License—Failure to Guard.—In *Downey v. Low*, 22 N. Y. App. Div. 460, 48 N. Y. S. 207, it is held, that an owner of premises who, under a license from a municipality, maintains a coal chute in the sidewalk in front of his premises, on condition that it be properly guarded, is liable to a passer-by injured by falling into it when open, although the coal chute was left open and unguarded by employees of an independent contractor, for the removal of the ashes from his building for a specified yearly sum.

12. CHARTER POWERS CANNOT BE TRANSFERRED.

a. General Rule.

Nor can the charter powers of a railroad or other corporation be delegated to an independent contractor, so as to exempt the corporation from liability for injuries resulting from the contractor's negligence or misfeasance in exercising such powers.

Illinois.—*Capital Electric Co. v. Hauswald*, 78 Ill. App. 359; *Chicago, etc., R. Co. v. Hart*, 209 Ill. 414, 70 N. E. 654; *Chicago v. Murdock*, 212 Ill. 9, 72 N. E. 46; *West v. St. Louis, etc., R. Co.*, 63 Ill. 545.

Minnesota.—*City of St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753.
New York.—*Lacour v. Mayor, etc., of New York*, 11 N. Y. Sup'r Ct. 407.

Pennsylvania.—*Philadelphia, W. & B. R. Co. v. Hahn (Pa.)*, 12 Atl. 479.

Vermont.—*Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365.

b. Illustrations.

Use of Construction Train for Carriage of Passengers by Contractor—Negligence of Railroad's Engineer—Injury to Employee.—

Where the work of constructing a railroad has been entrusted to an independent contractor, who employs and discharges his own assistants and workmen, he being responsible to the company only for the performance of his contract, and an employee on a construction train is injured by the negligence of its engineer, if the train was being used by the contractor, under a lease or other special arrangement with the railroad company, in the transportation of freight and passengers, the fact that he was an independent contractor for the construction of the road would not relieve the railroad company from liability; nor would the company be relieved from liability because the contractor was not authorized to use the train for that purpose. So held in *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94, 40 Am. & Eng. R. Cas. 559.

Operation of Trains by Contractor—Injuries.—Where a railroad company permits the independent contractor who is constructing its road to exercise its franchise of running cars drawn by steam over the road, it is as responsible for any injury thereby inflicted as though it were itself running the cars. So held in *Macon & Augusta R. Co. v. Mayes*, 49 Ga. 355.

Train Operated by Contractor—Stock Killed.—The fact that a

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train which killed cattle was being operated by an independent contractor did not relieve the railroad company from liability to their owners. So held in *Illinois Cent. R. Co. v. Finnigan*, 21 Ill. 646.

Where a wrongful act is done by contractors under a chartered company, in pursuance of the special powers and privileges conferred by its charter, and but for which it would have no right to prosecute its business, such contractors, as to third parties injured by their acts, will be regarded as the servants of the company, and the latter will be liable for such injuries. So held in *Capital Electric Co. v. Hauswald*, 78 Ill. App. 359.

Stock Killed by Construction Train.—In *Huey v. Indianapolis*, etc., R. Co., 45 Ind. 320, it is held, that it is no defense to an action against a railroad to recover for stock killed by a train run on its track, that the injury was inflicted by the train of another company, which was in the exclusive use and possession of the contractors, for the construction of defendant's railroad, who had not finished the same, or delivered to defendant the completed portion of the road.

Unloading Coal Cars in Street—Duty to Public.—In *Holmes v. Tennessee*, etc., R. Co., 49 La. Ann. 1465, 22 So. 403, it is held, that a railroad, coal and iron company, in the performance of the functions for which it was chartered, as is operating and unloading coal cars in the open street, owes a duty to the public, and cannot delegate the performance of its duties to an impecunious negro, as to an independent contractor, and so relieve itself from the responsibility which the law imposes on it towards the public.

Contract to Operate Cars by Horse Power—Personal Injuries from Act of Driver.—In *Philadelphia, W. & B. R. Co. v. Hahn* (Pa.), 12 Atl. 479, where a railroad company contracted with a man to move its cars along a certain part of its track by horse power, in the ordinary business of the road, the contractor employing the drivers and teams and exercising an independent control over them, and plaintiff was injured by the act of a driver thus employed, it was held, that the rule that a railroad cannot escape its charter obligation by delegating them to an independent contractor, was applicable.

Railroad Construction—Power to Take Materials from Adjoining Lands.—In *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365, it is held, that the power of the defendant railroad company to take land and other materials adjoining the line of its road, for the purpose of constructing its road, was conferred upon it by charter and was as necessary to exist in and be exercised by all the contractors on the road as by the company; that such power, to be exercised within reasonable limits and in a proper manner, was necessarily delegated from the corporation to the contractor, and for this purpose the contractor was the agent of the corporation, and the latter was liable to a landowner for damages occasioned by the exercise of such power by the contractor.

Nonexercise of Special Charter Power.—But a railroad company is not liable for the negligence of an independent contractor, not exercising any special power derived from the charter of the railroad. So held in *Boyd v. Chicago & N. W. R. Co.* (Ill.), 20 R. R. R. 154, 45 Am. & Eng. R. Cas., N. S., 154, 75 N. E. 496.

Railroad Construction.—And the rule that a railroad company cannot delegate to an employee its chartered rights and privileges so as to exempt it from liability, does not extend to the use of the ordinary ways and means for the construction of its road, but to the use of such extraordinary powers as the railroad itself could not exercise without having first complied with the conditions of its legislative grant of authority. So held in *Cunningham v. International R. Co.*, 51 Tex. 503, 32 Am. Rep. 632.

Where an independent contractor was constructing a railroad on the right of way of a corporation, which retained only the right to

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see that the contract was performed, he was not exercising a special power derived from the charter of the corporation, so as to render it liable for his negligence. So held in *Boyd v. Chicago & N. W. R. Co.* (Ill.), 20 R. R. R. 154, 43 Am. & Eng. R. Cas., N. S., 154, 75 N. E. 496.

The principle that where a duty is imposed upon a corporation, it cannot relieve itself from that duty and its liability thereunder, or shift its responsibility upon another, is not applicable to the duty of building a railroad. So held in *Burmeister v. New York Elev. R. Co.*, 47 N. Y. Sup'r. Ct. Rep. 264.

Same—Careless or Willful Acts of Contractor—Injuries to Third Persons.—In *Hughes v. Cincinnati & Springfield R. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100, it is held, that where a corporation, organized for the purpose of constructing and operating a railroad, has acquired its right of way by the exercise of the power of eminent domain, or otherwise, it may contract with another person for the construction of the whole or any part of the road, without retaining the right to control the mode or manner of doing the work; and, in such case, the railroad company will not be liable to third persons for an injury resulting from the carelessness or willful act of the contractor.

13. ILLEGAL ACTS OF CONTRACTORS.

a. General Rule.

Of course, one cannot with impunity have an illegal act performed by a contractor. In such case, the employer is as responsible as if he had done the deed himself, without the intervention of the contractor.

England.—*Ellis v. The Sheffield Gas Consumers Co.* (Eng.), 2 El. & Bl. 766.

United States.—*Chicago City v. Robbins*, 2 Black (U. S.) 419; *Ware v. St. Paul Water Co.* (D. C.), Fed. Cas. No. 17, 172.

Illinois.—*Cairo & St. Louis R. Co. v. Woosley*, 85 Ill. 370; *Chicago, etc., R. Co. v. McCarthy*, 20 Ill. 385; *Rockford, etc., R. Co. v. Wells*, 66 Ill. 321.

Kansas.—*Chicago, K. & W. R. Co. v. Watkins*, 43 Kan. 50, 22 Pac. 985, 40 Am. & Eng. R. Cas. 499.

Kentucky.—*James v. McMinimy*, 93 Ky. 471, 20 S. E. 435; *Matheny v. Wolffs*, 63 Ky. 137.

Maine.—*Eaton v. European & N. A. R. Co.*, 59 Me. 520.

Maryland.—*City & S. R. Co. v. Moores*, 80 Md. 348, 30 Atl. 643.

Massachusetts.—*Conners v. Hennessey*, 112 Mass. 96.

Missouri.—*Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Ullman v. Hannibal & St. J. R. Co.*, Mo., 67 Mo. 118; *Williamson v. Fischer*, 50 Mo. 198.

New Jersey.—*Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17.

New York.—*Brennan v. Schreiner* (Super. Ct. N. Y.), 20 N. Y. Supp. 130; *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartman*, 29 N. Y. 591, 86 Am. Dec. 341; *Gilbert v. Beach*, 11 N. Y. Sup'r Ct. 423; *Mayor of New York City v. Bailey*, 2 Denio 433; *Osborn v. Union Ferry Co.*, 53 Barb. 629; *Sulzbacher v. Dickie*, 51 How. Prac. Rep. (N. Y.) 500; *Vanderpool v. Husson*, 28 Barb. (N. Y.), 196.

Ohio.—*Carman v. Steubenville & Indiana R. Co.*, 4 Ohio St. 399; *Chambers v. Ohio Life Insurance & Trust Co.*, 1 Disn. (Ohio) 327; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590.

Pennsylvania.—*Allen v. Willard*, 57 Pa. St. 374; *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699; *Reed v. Allegheny City*, 79 Pa. St. 300.

Tennessee.—*Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691.

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Texas.—Houston, etc., R. Co. v. Van Bayless, 1 White (Tex. Civ. App.), § 500.

The doctrine that, when an injury is done by a person exercising an independent employment, the person employing him is not responsible to the party injured, relates to cases where the purpose of the contract is lawful and the owner of the property on which the power is to be exercised can lawfully commit its performance to others. So held in *Reed v. Allegheny City*, 79 Pa. St. 300.

In *Ellis v. The Sheffield Gas Consumers Co.* (Eng.), 2 El. & Bl. 766, it is held, that though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing the act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of the wrong.

b. Illustrations.

Nuisance.—In *Chicago City v. Robbins*, 2 Black (U. S.) 419, it is held, that if a nuisance necessarily occurs in the ordinary mode of doing work, the occupant or owner of the premises is liable, but if it happened through the negligence of the contractor or his servants, the contractor alone is responsible.

Where work is being done by an independent contractor, and an injury to a third person is occasioned by the negligence of his servants, the employer of the contractor may be liable, if the injury is such as might have been anticipated by him as the probable consequence of the work let out to the contractor, or if it be of such a character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work. So held in *City & S. R. Co. v. Moores*, 80 Md. 348, 30 Atl. 643.

Where an independent contractor undertakes to perform work for his employer's benefit which the employer, as a prudent man, has reason to believe is, in the ordinary mode of doing it, a nuisance, the employer is liable for any injuries that may result to third persons from the work. So held in *James v. McMinimy*, 93 Ky. 471, 20 S. W. 435.

In *Sulzbacher v. Dickie*, 51 How Prac. Rep. (N. Y.) 500, it is held, that where the act undertaken is one from its very character either a nuisance or one dangerous to others, the person undertaking it is not released from responsibility to any person thereby injured, although he has entered into a contract with some person to perform it, and the injury has occurred through the negligence of the latter.

In *Chambers' Adm'r v. Ohio Life Insurance & Trust Co.*, 1 Disn. (Ohio) 327, it is held, that an owner of real estate is not responsible for injuries done to third parties by contractors or their servants while working on the property, unless the act complained of be, in itself, unlawful, or is such as, in itself, to amount to a nuisance, and therefore unlawful. But if it, the thing to be done is lawful and proper, and the wrongful act which causes injury, is negligence on the part of those actually employed, then their principal only is responsible to third persons.

Nuisance Unexpectedly Resulting from Work—Injuries to Third Persons—Duties and Liabilities.—But where the employer has no reason to believe that the act contracted to be done is a nuisance, and it turns out during the progress of the work that it is necessary for the independent contractor to create a nuisance in order to do the work, then the employer is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence. But upon receiving such notice, in order to protect himself, he must take such reasonably prompt and efficient means as are in his power to suppress the nuisance. So held in *James v. McMinimy*, 93 Ky. 471, 20 S. W. 435.

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Contract to Dig Trenches in Streets for City—Nuisance Created by Subcontractor.—In *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, it is held, that persons who stand in a contract relation to the public, represented by the city authorities, to dig trenches and lay pipes in the streets in a manner required by an ordinance of the city, cannot relieve themselves of the duty imposed by the contract by contracting with another to do the work, which cannot be done without danger to the public; and if such work is done without authority, or not done in the manner required by ordinance, the departure from authority creates a nuisance for which the contractor with the city is responsible to travelers on the street for injury caused thereby, notwithstanding the nuisance is created by a subcontractor having an independent contract under the contractor with the city.

Work on Owner's Premises—Nuisance.—When the owner of lands undertakes to do a work, which in the ordinary mode of doing it, is a nuisance, he is liable for any injury which may result from it to third persons, though the work is done by a contractor exercising an independent employment and employing his own servants. So held in *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17.

Construction of Railroad—Destruction of Fences—Failure to Erect Cattle Guards—Damage to Crops.—A lessee was in possession of a farm, when the lessor conveyed for a valuable consideration to a railroad a right of way through the farm. An independent contractor of the railroad, under contract for the construction of the road, entered on the farm, threw down the fences thereon, and failed to erect cattle guards on the line of railway where the same entered the farm, by reason of which cattle entered on the farm and destroyed the lessee's crops. It was held, that the railroad was liable to the lessee for the damage to the crops, because, as it had no right to enter the farm until the lessee was fully compensated, or consented, it authorized and procured the commission of a trespass in employing and directing the construction company to enter the field and commence construction. *Clark v. St. Louis, etc., R. Co. (Ark.)*, 94 S. W. 930, 21 R. R. 39, 44 Am. & Eng. R. Cas., N. S., 39.

Excavation in Sidewalk—Failure to Comply with Ordinance.—Where the making and maintenance of an excavation in a sidewalk was unlawful, for want of compliance with an ordinance of the city, the owner of the abutting premises could not relieve himself from the duty of complying with the ordinance by shifting it on to an independent contractor. So held in *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220.

Tortious Acts.—Contractors for constructing a railroad are the servants of the railroad company authorized to construct it; and the tortious acts of the contractors, while about the business of the company, are properly chargeable to it. So held in *Chicago, etc., R. Co. v. McCarthy*, 20 Ill. 385.

Trespasses.—A railroad company is liable for the trespass of hands employed by its contractors while engaged in the construction of its road; and where it appears that the trespass consists in entering upon the plaintiff's land and digging up the soil, and making embankments, it is not error to refuse evidence that the company had nothing to do in employing the hands doing the work, but that they were employed and paid by the contractor. So held in *Cairo & St. Louis R. Co. v. Woosley*, 85 Ill. 370.

Where the contractors of a railroad company are guilty of trespasses upon the land of a third person, in constructing the railroad, the company will be liable therefor. So held in *Rockford, etc., R. Co. v. Wells*, 66 Ill. 321.

Where a railroad directs and procures a trespass to be committed by a contractor constructing its roadbed, it is liable with those who committed it. So held in *Chicago, K. & W. R. Co. v. Watkins*, 43 Kan. 50, 22 Pac. 985, 40 Am. & Eng. R. Cas. 499.

Same—Excavations—Injury to Adjoining Owner.—Where one not

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in actual possession of a strip of land, the title to which is in another, without the latter's consent, enters on such premises by his agents, and so excavates as to injure the buildings of an adjoining owner, he is liable therefor, even though the person who actually committed the injury was an independent contractor, where it appears that the work was done with the knowledge and consent of the defendant and for his use and benefit. So held in *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077.

Railroad Construction—Injury to Lessee.—In *Ullman v. Hannibal & St. J. R. Co.*, 67 Mo. 118, it is held, that a railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon land which it has acquired, subject to an existing lease, is liable, as a joint tortfeasor with the contractor and his servants, for damages done by them, in the prosecution of the work, to the crops of the lessee.

Unauthorized and Unlawful Acts—Liability of Owner of Real Estate.—But in *Chambers v. Ohio Life Ins. & Trust Co.*, 1 Disn. (Ohio) 327, it is held, that an owner of real estate who has not personally interfered, or given any directions as to the performance of work on the property, but has merely contracted with a third person to do it, cannot be held responsible for an unauthorized and unlawful act of such third person in the course of the work.

Repair of Levee—Removing Earth from Highway.—And one who employs a contractor to repair a levee in the vicinity of a highway is not responsible for the consequences of an illegal act of the latter in removing earth from the highway, to be used in making the repairs, unless such removal entered into and formed a part of the contract of employment. So held in *Andrews v. Runyon*, 65 Cal. 629, 4 Pac. 669.

Use of Real Property—Injuries from Negligent Manner of Doing Work.—And where the relation of independent contractor exists as to the use of real property, and the party employed is skilled in the performance of the duty he undertakes, and the thing directed to be done is not in itself a nuisance, nor will necessarily result in a nuisance if proper precautionary measures are used, and an injury results, not from the fact that the work is done, but from the negligent manner of doing it by the contractor or his servants, the owner cannot be made to respond in damages. So held in *Robinson v. Webb*, 74 Ky. 464.

Turnpike—Repairs—Use of Steam Engine—Nuisance.—And the use of a steam engine on a turnpike road, for hauling material to be used in repairs, is not such a nuisance per se as would make the turnpike company liable to third persons for the negligence of the servants of an independent contractor, having exclusive control of the engine and work. So held in *City & S. R. Co. v. Moores*, 80 Md. 349, 30 Atl. 643.

Duty of Owner of Real Estate to Supervise Work.—Nor is the owner of real estate bound at his peril to stand by and see that a contractor whom he employs to do a lawful act does not, for the convenience of himself or his employees, commit wrongful acts while performing their duty. So held in *Maltbie v. Bolting*, 6 N. Y. Misc. 339, 26 N. Y. Sup. 903.

14. WORK NECESSARILY OR PROBABLY INJURIOUS TO OTHERS.

a. General Rule.

Where the contract undertaking from its very nature is necessarily dangerous to the person or property of a third party, the employer is not relieved from responsibility to such party because he has entered into a contract for the performance of the work with an independent contractor and injury occurs solely by reason of the failure of the latter to take the proper and reasonable precautions to

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prevent the performance of the contract work from resulting in injury to others.

England.—*Angus v. Dalton*, 4 Q. B. Div. (Eng.) 762; *Bower v. Peate*, 1 Q. B. Div. (Eng.) 321.

United States.—*Fowler v. Saks*, 7 Mackey (D. C.) 570; *Philadelphia & Havre De Grace Steam Tow Boat Co. v. Philadelphia, W. & R. R. Co.* (D. C.), Fed. Cas. No. 11,085; *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.), 566.

Alabama.—*Montgomery St. R. Co. v. Smith*, 19 R. R. R. 131, 42 Am. & Eng. R. Cas., N. S., 131, 39 So. 757.

Georgia.—*Savannah v. Waldner*, 49 Ga. 316.

Illinois.—*Capital Electric Co. v. Hauswald*, 78 Ill. App. 359; *Chicago v. Murdock*, 212 Ill. 9, 72 N. E. 46; *City of Joliet v. Harwood*, 86 Ill. 110; *Village of Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33.

Indiana.—*Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123.

Kentucky.—*Baumeister v. Markham*, 101 Ky. 122, 39 S. W. 844; *James v. McMinimy*, 93 Ky. 471, 20 S. W. 435.

Maine.—*Veazie v. Penobscot R. Co.*, 49 Me. 119.

Maryland.—*City & S. R. Co. v. Moores*, 80 Md. 349, 30 Atl. 643; *Mayor, etc., of Baltimore v. O'Donnell*, 53 Md. 110; *Smith v. Benick*, 87 Md. 610, 41 Atl. 56.

Massachusetts.—*Inhabitants of Lowell v. Boston & L. R. Co.*, 40 Mass. 24.

Missouri.—*Dillon v. Hunt*, 105 Mo. 154, 16 S. W. 516.

New York.—*Buddin v. Fortunato* (C. P. N. Y.), 10 N. Y. Supp. 115; *Creed v. Hartman*, 29 N. Y. 591, 86 Am. Dec. 341; *Ryder v. Thomas*, 13 Hun (N. Y. Sup. Ct.) 196; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Sulzbacher v. Dickie*, 51 How. Prac. Rep. 500; *Weber v. Buffalo Ky. Co.*, 20 N. Y. App. Div. 292, 47 N. Y. S. 7.

Ohio.—*Circleville v. Neuding*, 41 Ohio St. 465; *Covington & Cincinnati Bridge Co. v. Steinbrock* (Ohio), 55 N. E. 618; *Hughes v. Cincinnati & Springfield R. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; *Samyn v. McClosky*, 2 Ohio St. 536; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408.

Tennessee.—*Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 691.

Virginia.—*Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 230.

West Virginia.—*Carrico v. West Virginia Cent., etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571; *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

A person cannot contract with another to do an act which necessarily involves the doing of an injury to a third party and escape liability under the plea that there is the intervention of an independent contractor. So held in *Florsheim v. Dullaghan*, 58 Ill. App. 593.

Where the work which an independent contractor agrees to perform is, in its very nature and necessarily, injurious to a third party, the doctrine of respondeat superior applies. So held in *Williams v. Fresno C. & I. Co.*, 96 Cal. 14, 30 Pac. 961.

The principal is liable for the acts of an independent contractor employed by him where the work to be done is intrinsically dangerous, however skillfully performed. So held in *Montgomery St. R. Co. v. Smith* (Ala.), 19 R. R. R. 131, 42 Am. & Eng. R. Cas., N. S., 131, 39 So. 757.

The owner of real estate is not liable for acts of a contractor employed to do work upon it unless the contractor is his employee, and not an independent contractor, or unless the work, as authorized by the contract, necessarily produced the injury, or unless the injuries were occasioned by the omission of some duty imposed upon the owner by law. So held in *Ryder v. Thomas*, 13 Hun (N. Y. Sup. Ct.) 196.

If the work let to an independent contractor is of such character

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that its probable effect will be to injure another, a railroad company cannot escape liability for its negligent performance by delegating the work to an independent contractor. So held in *St. Louis, etc., R. Co. v. Yonley*, 53 Ark. 503, 14 S. W. 800.

The rule exempting an employer from responsibility for negligence of an independent contractor has no application where the injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. So held in *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269.

In *Covington & Cincinnati Bridge Co. v. Steinbrock* (Ohio), 53 N. E. 618, it is held, that where danger to others is likely to attend the doing of certain work, unless care is observed, the person having it to do is under a duty to see that it is done with reasonable care, and cannot, by the employment of an independent contractor, relieve himself from liability for injuries resulting to others from the negligence of the contractor or his servants.

But when the work to be done will not be dangerous to third parties unless it is made so by the dangerous, unskillful or negligent manner in executing it; and it is done by one contracting to do it, and having exclusive control of the hands employed, and injury results from such unskillfulness, the employer of the contractor is not liable. So held in *O'Rourke v. Hart*, 7 Bosw. (N. Y. Sup'r Ct.) 511.

In *Ware v. St. Paul Water Co.* (D. C.), Fed. Cas. No. 17,172, it is held, that where a person or corporation is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, there is a liability on the part of the person or corporation doing the work from injuries resulting from negligence, though the work be done by an independent contractor, and though the contractor be not an unskillful or improper person.

b. Illustrations.

Work on Employer's Premises—Injuries to Neighbor.—In *Bower v. Peate*, 1 Q. B. Div. (Eng.) 321, it is held, that a man who orders work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief; and cannot relieve himself of his responsibility by employing an independent contractor to do what is necessary to prevent the act he had ordered to be done from becoming wrongful.

Excavation in Street—Failure to Guard.—An unguarded excavation in the sidewalk of a street in a city is so dangerous as to be in the nature of a nuisance, and he who causes it to be dug, knowing beforehand its character, cannot escape liability to one who falls into it, upon the ground that he let out the job of making it to an independent contractor. So held in *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220.

Erection of Building—Nuisance.—Where the owner of real estate in a city contracts for the excavation of a cellar and the erection of a building, and it is done in such a manner as to result necessarily in a nuisance, unless prevented by the proper precautionary measures, the owner is bound to use such measures, or answer in damages for injuries resulting to others from the neglect to do so, whatever may have been his contract with the contractor. So held in *Matheny v. Wolffs*, 63 Ky. 137.

Repair of Awning Extending from Building over Public Way—Absence of Special Contract—Negligence of Carpenter—Injury to User of Street.—In *Brackett v. Lubke*, 86 Mass. 138, 81 Am. Dec. 694, it is held, that the lessee of a building who has employed a car-

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penster to repair an awning which extends from the building over a public way, with no special contract as to the terms, price, or time of doing the work, is liable for an injury sustained by one who is lawfully using the way, by reason of the negligence of the carpenter in making the repairs.

Excavating for Foundation of Building—Falling of Bank—Injury to Workman.—In *O'Driscoll v. Faxon*, 156 Mass. 527, 31 N. E. 685, where a workman employed in laying the foundation walls for a building brought an action against the owner of the premises for injuries occasioned by the falling of a bank, it was held, that the jury were rightly instructed that, while the plaintiff must show that he was in the exercise of due care, if the owner ordered the digging, and it was negligence to make it, he was liable, but if it was not negligence to make it, he was not liable; that if the owner did not order the digging, but gave a general authority to his contractor or the contractor's foreman to call on the latter's men to prepare the work and he was negligent, and by reason thereof the accident occurred, then the owner was liable, but if the man was not negligent, then the owner was not liable; and that if the owner gave authority to this contractor or the contractor's foreman to call upon his man to do such things as they might wish done to help them in any part of the work, not as a part which the owner had agreed to do, but as an assistance or aid to them in their own part, then the owner was not liable.

Contract to Blast in Street—Negligence of Subcontractor—Personal Injuries.—In *Buddin v. Fortunato* (C. P. N. Y.), 10 N. Y. Supp. 115, it is held, that one who contracts to do blasting in a street is not relieved from responsibility to any person injured thereby, though he has sublet the contract to a third person, through whose negligence the injury occurred.

Contract to Quarry Stone—Blasting—Injury to Adjoining Property.—In *Tiffin v. McCormick*, 34 Ohio St. 638, 32 Am. Rep. 408, it appeared that the owner of a stone quarry hired a person "to go into the quarry, quarry stone therein, break the same to a certain size, and pile them up so they can be measured," and "had no other or further control" over the employee, who was "to furnish and find the gunpowder and other tools," and receive compensation at the rate of \$1 per perch; and that the employee, by blasting, destroyed the buildings of an adjoining proprietor. It was held, the employer was liable for such injury.

Contract to Perform Work Near Railroad Track—Negligence—Obstructing Track—Injury to Passenger.—In *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 230, it is held, that if a railroad company, while using its track for the carriage of passengers engages in a work to be done on its road and in the immediate proximity of its track, negligence in the performance of which would, in the opinion of cautious persons, involve the hazard of obstructions to the passage of its cars, and an accident to a passenger is caused by an obstruction arising from negligence in the performance of the work, it is no defense that the company had placed the work in the hands of an independent contractor, and that the obstruction was caused by the negligence of one of his employees.

Injuries to Neighboring Property.—In *Angus v. Daleton*, 4 Q. B. Div. (Eng.) 162, it is held, that where a contractor has been employed to do work which, in its nature, is dangerous to neighboring property and damage results from the work, the employer is liable to the owner of such neighboring property, although the contractor is competent and he had been directed by the employer to take proper precautions in executing the work.

Negligence of Servants of Aeronaut—Injury to Spectator—Liability of Proprietor of Pleasure Resort.—But in *Smith v. Benick*, 87 Md. 610, 41 Atl. 56, it is held, that where the proprietor of a pleasure resort employs a competent aeronaut to make balloon ascensions

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from the grounds, and the method of making them is not one likely in itself to cause injury to spectators and the aeronaut is an independent contractor, supplying his own servants and using his own discretion, the proprietor of the resort is not liable to a third party injured by the casual negligence of the servants of the aeronaut.

Contract to Drill Well on Schoolhouse Grounds—Drilling Machine Left Unguarded—Injury to Child—Liability of District.—So in *Wood v. The Indiana School Dist. of Mitchell*, 44 Iowa 27, it appeared that a person who had contracted with a school district for drilling a well in the schoolhouse grounds, left his drilling machine unlocked and unguarded; and, in his absence, one of the children was injured while playing with it. It was held, that the danger arose, not from the character of the work, but from the machinery used, and, therefore, the district was not liable for such injury.

Changing Position of Beams in Party Wall—Negligence—Injury to Building.—And in *Keller v. Abrahams*, 13 Daly (N. Y. Com. Pl.) 188, it is held, that where the owner of one of two adjacent buildings supported by a party wall, in improving his property, makes a change in the position of the beams in the party wall, if the work is of such description as can be performed with entire safety to the party wall, having in itself no tendency to injure the wall, he is not liable to the owner of the adjoining building either as a trespasser or for negligence of the independent contractor who performs the work.

Contract to Paint Superstructure of Elevated Railway—Negligence—Frightening Teams.—So in *M'Cann v. Kings County, etc., R. Co.* (City Ct. Brook), 19 N. Y. Supp. 668, it is held, that an elevated railroad company is not liable for the negligence of the employees of a person contracting to paint its superstructure, in permitting a canvas stretched thereunder for the interruption of paint drops to become loose so as to play with the wind and frighten horses in the street.

Contract to Make Cellar Waterproof—Negligence in Using Coal Hole.—Nor is the work of making the cellar in a building waterproof inherently dangerous because it is necessary to use the coal holes in the pavement for the purpose of ventilation and for the introduction of materials; and the owner is not liable for the negligence of the contractor for the work in using a coal hole. So held in *Maltbie v. Bolting*, 6 N. Y. Misc. 339, 26 N. Y. Supp. 903.

New Railroad Bridge Substituted for Old One—Train Breaking Through—Death of Fireman.—And in an action against a railroad for the death of its fireman, caused by its train breaking through a bridge, it appeared that a new bridge was being substituted for an old one, by a certain method, so as not to interrupt traffic; that the work, which was not intrinsically dangerous, was being performed by an independent contractor, which had been selected with due care; and that the negligence of such contractor was the sole cause of the accident. It was held, that the railroad company was not liable. *Norfolk & W. R. Co. v. Stevens*, 16 Am. & Eng. R. Cas., N. S., 468, 85 Va. 302, 7 S. E. 251.

15. RATIFICATION OF CONTRACTOR'S ACTS.

Ratification by the employer may render him liable for acts of a contractor for which he would not otherwise be responsible. *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320.

Wrongful Appropriation of Land—Ratification.—Where, in an action against a railroad company for the wrongful appropriation of land, the complaint shows a wrongful appropriation of the plaintiff's land, an answer that the appropriation was made by a contractor of the railroad company is bad on demurrer, for if the railroad adopted the acts of its contractor, in appropriating the land, it must pay a just compensation. So held in *Bloomfield R. Co. v. Grace*, 112 Ind. 128, 13 N. E. 680.

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16. ACCEPTANCE OF WORK.

After the contract work has been performed, and the employer has accepted it, he will, as a general rule, be responsible for all injuries to third parties resulting from defects in the work of the existence of which he was chargeable with notice before such injuries were sustained. *Vogel v. Mayor, etc.*, of New York, 92 N. Y. 10, 44 Am. Rep. 349; *Chartiers Val. Gas Co. v. Waters*, 123 Pa. St. 220, 16 Atl. 423; *Fitzmaurice v. Fabian*, 147 Pa. St. 199, 23 Atl. 444; *Mahanoy Township v. Scholly*, 84 Pa. St. 136; *Paris Gas-Light Co. v. McHam*, 2 Will. (Tex. Civ. App.), § 651.

Nuisance Created by Manner of Performance.—One who employs an independent contractor to do a work, not in its nature a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, if he accepts the work in that condition, becomes at once responsible for the nuisance. So held in *Vogel v. Mayor, etc.*, of New York, 92 N. Y. 10, 44 Am. Rep. 349.

Contract to Put in Electric Light Wires—Supporting Wires of Sign Cut—Personal Injuries.—In *Railway Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, it appeared that defendant railroad maintained an overhanging sign; that in putting in some electric light wires the servants of an independent contractor, with defendant's knowledge, cut the wires which fastened the sign and neglected to restore them; that two months afterward it fell upon a passer-by. It was held, that the railroad was guilty of negligence in failing to see that the fastenings were safely restored.

Defective Construction of Building.—The owner of a building, who had it erected by a contractor, is liable in case, where an action can be maintained, for injuries sustained by another by reason of its defective construction, after he has accepted the building from the contractor. So held in *Fanjoy v. Seales*, 29 Cal. 243.

Roof Repairing—Fall of Piece of Zinc—Injury to Traveler.—In *Khron v. Brock*, 144 Mass. 516, 11 N. E. 748, it is held, that the owner of a building under his own control and in his own occupation is liable for an injury caused to a traveler on the highway by the falling of a piece of zinc from the roof of the building, which has been repaired under an entire contract, by the terms of which the contractor was to furnish all the labor and materials therefor, if the latter had completed his contract and ceased to work thereunder.

Structure Appropriated to Intended Use—Absence of Formal Acceptance.—A property owner who, though without formally accepting work done for him by an independent contractor, steps in and assumes the practical control of the structure by appropriating it to the use for which it is constructed, and, by so doing, treats the structure as his own, becomes liable to third parties for injury therefrom to the same extent as if there had been a formal acceptance of it. So held in *Read v. East Providence Fire District*, 20 R. I. 574, 40 Atl. 760.

Excavating—Accumulation of Water—Injury to Adjoining Building.—Where a landowner, in making an excavation for a building on his own land, removed the earth from the wall of a building adjoining, and in making such excavation and removing the earth therefrom with teams, sloped the same up to the street and allowed bricks from an old building which had been removed to the street and gutter to remain therein, thereby causing the water from a heavy rain to flow from the street into the excavation in large quantities, such landowner is liable for damages caused to the wall by such water, notwithstanding the bricks were removed by a contractor and ordered by the owner to be placed in the street, though not ordered to be placed in the gutter, where such contract for removing the bricks to the street had been completed and the bricks were in the possession of the landowner for more than a month before the accident. So held in *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489, 49 N. E. 296.

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Contract to Build Party Wall—Fall of Wall—Injury to Adjoining Owner.—The owner of land, who makes a contract with a firm of masons, by which the latter are to furnish all the materials and labor in building a party wall, half on his land and half on the land of an adjoining owner, is liable in tort to such adjoining owner, after the wall has been completed and accepted, for an injury to his property from the fall of the wall, resulting from its defective condition, whether owing to his own negligence or that of the masons. So held in *Gorman v. Gross*, 125 Mass. 232, 28 Am. Rep. 234.

Bridge—Contract Abandoned—Piles Left in River—Vessel Injured.—Where a railroad company employed contractors to build a bridge, and for that purpose drive piles in a river, and, owing to the abandonment of the contract, the piles were left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company was responsible for the injury. So held in the *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 209.

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(Supreme Court of Georgia, Nov. 10, 1906.)

[55 S. E. Rep. 472.]

Commerce—Regulations—Constitutional Law.*—The decision in *Hennington v. State*, 17 S. E. 1009, 90 Ga. 390, as affirmed by the Supreme Court of the United States in *Hennington v. Georgia*, 16 Sup. Ct. 1086, 163 U. S. 299, 41 L. Ed. 166, is, upon review, adhered to and reaffirmed.

Sunday—Running Trains on Sunday.—The evidence authorized the verdict, and no sufficient reason appears for reversing the judgment. (Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

J. N. Seale was convicted of violation of the Sunday law, and brings error. Affirmed.

The record discloses that J. N. Seale, the plaintiff in error, was superintendent of transportation of the Southern Railway Company, which company, as a common carrier chartered under the laws of Virginia, has a line of railroad running through the states of Virginia, North Carolina, South Carolina, and into and through the state of Georgia. Seale was indicted as such superintendent in the superior court of Habersham county for the offense of having unlawfully, on the 24th day of May, 1903, the same being the Sabbath, commonly known as Sunday, run a freight train on said road in said county. The evidence supports the foregoing, and further discloses that the train in question was an interstate train, running from Greenville, S. C., to Atlanta, Ga., and carrying freight from one state into another; that the train carried only dead freight, and none of the classes of freight which the statute

*See *Skipper v. Seaboard Air Line Ry.*, ante, p. 306, and foot-note.

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of Georgia authorizes to be carried on Sunday. Pen. Code 1895, § 420, provides as follows: "If any freight train, excursion train or other train than the regular trains run for the carrying of mails or passengers, shall be run on any railroad on the Sabbath day, the superintendent of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable to indictment in each county through which such train shall pass, and shall be punished as for a misdemeanor. The foregoing provisions shall not extend to: 1. A train which has one or more cars loaded with live stock, and which is delayed beyond schedule time. Such train shall not be required to lay over on the line of road during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where such animals may be fed and watered, according to the facilities usually afforded for such transportation. 2. A freight train running over a road on Sunday night, if the time of its arrival at destination, according to the schedule by which it started on the trip, be not later than eight o'clock Sunday morning. 3. Special fruit, melon, and vegetable trains, the cars of which contain no other freight except perishable fruits, melons, vegetables, fresh fish, oysters, fresh meats, live stock and other perishable goods of a like character, and which trains shall be loaded and leave the station from which they start in this state before the hour of midnight on Saturday night previous to the Sunday on which they are operated. No company shall be compelled to run the trains mentioned in this paragraph, and all freight trains or cars thus loaded and coming into this state may run to any point of destination in this state or continue their run through the state on Sunday." Since the adoption of that Code, the Legislature passed an act (see Acts 1897, p. 38) amending the section just quoted by adding a fourth class of exceptions to the general provisions of the law, as follows: "The foregoing provisions shall not extend to * * * trains on railroads where the line of said railroad begins and ends in another state, and does not run a distance greater than three miles through this state." An act was passed (see Acts 1899, p. 88), amending the act of 1897, by substituting the word "thirty" for the word "three," thus extending the exemption to interstate trains on roads that do not "run a distance greater than thirty miles through the state." Van Epps' Code Supp. § 6749.

Upon the trial of the case the defendant requested the court to charge as follows: "(1) I charge you that if you believe, under the evidence, the Southern Railway Company was an interstate railroad, or common carrier doing an interstate business, and that the train in question was one carrying freight from one state into another, and if you further believe that the statute of Georgia, under which defendant is indicted, if enforced, would have the effect to hinder such interstate business being done by an interstate railroad, then I charge you that the statute of the state is inoperative, because it would thereby

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affect interstate commerce, and contravene the commercial clause of the federal statute. (2) If you believe, from the evidence in this case, that the defendant was superintendent of the transportation of the Southern Railway Company, and that the Southern Railway Company was an interstate railroad, doing interstate business, and that a freight train being pulled by engine No. 368 left Greenville, S. C., destined for a point in another state, and in order to reach such point had to pass through the county of Habersham, and in so doing ran a part of the distance in said county on Sunday, I charge you that the statute of Georgia regulating the running of freight trains on Sunday is inapplicable to such interstate trains, and it would be your duty to find the defendant not guilty. (3) If you believe, from the evidence, that the Southern Railway Company, at the time the freight train in question was run, was interstate railroad and common carrier, and at the time in question was carrying freight from one state into another in the regular discharge of its duty as such common carrier, then I charge you that sections 420 and 421 of the Penal Code of 1895 of Georgia, as amended by Acts 1897, p. 38, and Acts 1899, p. 88, are not applicable to the case at bar. Such interstate railroad is not subject to a state statute which in any way hinders or interferes with the interstate commerce being done thereby. The statute as to such interstate railroads contravenes section 3 of article 1 of the federal Constitution, which provides that Congress shall have exclusive power to regulate commerce with foreign nations and among the several states." Each of the foregoing requests to charge was refused by the court. The defendant was convicted, and it moved for a new trial upon the grounds (1) that the verdict is contrary to evidence; (2) that the verdict is contrary to law; and (3) that the court erred in refusing requests to charge above mentioned. This court overruled the motion, and the movant excepted.

Jno. J. Strickland, for plaintiff in error.

W. A. Charters, sol. Gen., for the State.

ATKINSON, J. In *Hennington v. State*, 90 Ga. 396, 17 S. E. 1009, it was held that section 4578 of the Code of 1882 (Pen. Code 1895, § 420), in making it a misdemeanor to run a freight train upon any railroad in this state on the Sabbath day, was a regulation of internal police, and not a regulation of commerce, and was, therefore, not in conflict with the provision in the Constitution of the United States delegating to Congress the power to regulate commerce among the several states. This decision was rendered in 1892, and upon a writ of error to the Supreme Court of the United States the ruling was affirmed by that court. *Hennington v. State of Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166. It was said by that court that there was nothing in the legislation in question that suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who on the

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Sabbath day were in the territorial jurisdiction of the state; that, while the statute affects interstate commerce in a limited degree, it is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but is an ordinary police regulation, designed to secure the well-being and promote the general welfare of the people of the state, and is not invalid by force alone of the Constitution of the United States; and that it is to be respected in the courts of the Union until superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. There has been no legislation by Congress on this subject, and therefore the rulings of this court, as affirmed by the Supreme Court of the United States, is the law of the land at the present time. We have been requested to review and overrule the decision of this court above referred to. We decline to do this, for two reasons: (1) We are entirely satisfied with the reasoning of the learned Chief Justice who rendered the opinion in that case. (2) The conclusion reached by him was affirmed by the Supreme Court of the United States; and, until that court sees fit to overrule the decision made by it, we are bound to follow it.

Since that decision was rendered an act has been passed by the General Assembly (Acts 1897, p. 38), declaring that the law prohibiting the running of freight trains on Sunday should not apply to a train carrying freight on a line of railroad which begins and ends in another state, and does not run a greater distance than three miles in this state; and the amending act has been amended by extending the distance in this state to 30 miles (Acts 1899, p. 88). It was argued that, even if the Hennington Case was correctly decided, it is controlling only upon the statute as it existed at the time that decision was rendered, and that the effect of the amendatory acts just referred to is to make a discrimination against those railroads whose lines in Georgia are longer than 30 miles. It is unnecessary for us to determine in the present case whether the effect of these amendatory acts is to bring about such a discrimination as would either render the amending acts void, or have any effect upon the original statute, or in any way impair the force of that statute with reference to trains not embraced within the terms of the amending acts. A careful examination of the assignments of error which are contained in the motion for new trial discloses that none of them were sufficient to raise a question of this character for decision by the lower court. The question decided by the lower court were those which were raised by the three requests to charge which are embodied in the statement of facts and the general grounds. It is clear that the only question raised in the first and second requests is whether the statute of Georgia under which the accused was indicted is applicable to an interstate train. In the third request reference is made to the amending statutes above referred to, but the effect of the request is simply to raise the question as to whether the

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statute as amended is such a regulation of interstate commerce as would be rendered void when attempted to be applied to an interstate train. There is nothing in the request which, properly construed can in any view raise the question as to the validity of the amending acts, or as to the effect of the amending act upon the original act. The judge was simply requested to instruct the jury that the law of Georgia as it now stands; that is, the section of the Penal Code, as amended by the two acts above referred to—was a regulation of interstate commerce, and therefore void so far as it embraced an interstate train. Whether the statute as amended was obnoxious to any provision of the state Constitution, or any provision of the Constitution of the United States other than the commerce clause, is not involved at all in any question made by the present record. If the section of the Penal Code as it stood at the time that the Hennington Case was decided was not a regulation of interstate commerce, there was nothing in the amendatory acts which would change its character in this respect. The evidence was sufficient to authorize the verdict, and we see no reason for reversing the judgment refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

HUTTO v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Oct. 15, 1906.)

[55 S. E. Rep. 443.]

Jury—List—Preparation—Canvassing.—That the supervisors and not the jury commissioners prepared the lists from which names to fill the jury box were made up, but which list was canvassed by such commissioners in January, instead of December, as provided by the jury law of 1902, does not vitiate the panel.

Carriers—Passenger with Pass—Injury to Baggage.*—Where plaintiff was traveling on a pass under an agreement thereon that the railroad company should not be liable for damage to property of such person by negligence of its agents or otherwise, such person could not recover for loss of baggage, except for willful misconduct.

Appeal from Common Pleas Circuit Court of Barnwell County; Purdy, Judge.

Action by Rosa Hutto against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert Aldrich, for appellant.

E. T. La Fitte and *J. F. Carter*, contra.

JONES, J. The plaintiff brought this action to recover damages

*See foot-note appended to *Holly v. Southern Ry. Co.* (Ga.), 13 R. R. R. 308, 36 Am. & Eng. R. Cas., N. S., 308.

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for the loss of a trunk and contents delivered to defendant as baggage on June 20, 1905, when she became a passenger on defendant's train from Denmark, in Barnwell county, to Calhoun, in Pickens county, and recovered judgment, from which defendant appeals.

After interposing a demurrer to the complaint for insufficiency, which was overruled, defendant challenged the whole array of jurors drawn for the term, on the ground that the list from which the names were taken to be placed in the jury box was prepared by Mr. E. C. Bruce, the supervisor, and not by the jury commissioners, composed of the county auditor, county treasurer, and clerk of court, as provided in the jury law of 1902. After taking testimony on the point, Judge Purdy overruled the objection, under the authority of *Rhodes v. Southern Ry. Co.*, 68 S. C. 494, 47 S. E. 689. The testimony developing that the list was made up about the 1st of January, or early in January, instead of in December, as prescribed by the act, this fact was also urged as an objection to the array, but was also overruled, under the principle of said case, as a mere irregularity not sufficient to vitiate the drawing of the jury.

1. Appellant's first exception questions these rulings. We approve the ruling of the circuit court. The evidence shows that, while the supervisor did prepare a list of names for the jury commissioners, the jury commissioners carefully revised the same, and made a selection, from which the jury box was made up. The *Rhodes Case*, to which reference has been made, decides that the fact that the clerk of the board of county commissioners prepared a list of the electors from the tax books, which was canvassed and revised by the proper officers, was a mere irregularity, and therefore an insufficient ground for quashing the array of jurors. In the same case it was held that leaving the list in the clerk's office and not in the jury box, as required by statute, and the fact that there were two lists instead of one, are mere irregularities. In *State v. Smalls*, 73 S. C. 519, 53 S. E. 976, it was again declared that the statutes which prescribed the time and manner of selecting jurors are usually regarded as directory, and hence there was not a fatal defect, in drawing grand and petit jurors, to assign as grand jurors those regarded to be best qualified for grand jury duty, and leaving the others drawn for the petit jurors, although the statute prescribed that "the persons whose names are first drawn, to the number required, shall be returned as grand jurors, and those afterwards drawn, to the number required, shall be jurors for trials." There is no suggestion in this case that the jurors selected were not good and lawful men qualified to sit as jurors, or that defendant's rights were in any wise injured or prejudiced by any conduct of the jury commissioners. The foregoing covers all the specifications of error as to matters brought to the attention of the circuit court and ruled upon, and hence the first exception is overruled.

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2. The defendant alleged as a defense, and introduced evidence to prove, that plaintiff was not a passenger for hire, and that she and her baggage were being transported on a "free pass," bestowed as a gratuity, upon a special agreement printed on the pass, as follows: "The person accepting this pass agrees that the Southern Railway Company shall not be liable under any circumstances, whether by negligence of agents or otherwise, for any loss or damage to the property of the person using the same."

Appellant's second exception alleges that the court erred in refusing to instruct the jury that the plaintiff, under the terms and conditions of the pass upon which she was traveling, waived all right to recover for loss of property. At the request of appellant, the circuit judge charged the jury that, if said baggage was carried without compensation, the appellant could only be liable as a gratuitous bailee—that is, for a failure to exercise slight care—or could only be answerable for gross neglect or bad faith. The jury were further instructed in these words: "The railroad company could stipulate upon what terms it would receive her gratuitously, upon what terms they would receive her with her trunk gratuitously, and, if she entered upon that contract, she was bound by it, except that having received her, and if it received her property (her trunk) then it would not be liable, unless it be shown that the railroad company was guilty of willful or wanton misconduct towards her, or showed a reckless disregard of her rights." It seems to us, therefore, that the circuit court instructed the jury somewhat more favorably for defendant than it contended for, and quite as favorably as any view of the authorities on this subject could possibly permit. Under the charge, the defendant was exonerated from all liability for loss of baggage carried gratuitously under the special contract mentioned, even though the loss resulted from the negligence of the defendant, whether ordinary or gross, unless so gross as to show a wanton or willful disregard of plaintiff's rights. There is some conflict among the authorities in the various jurisdictions as to whether such a contract as applied to a passenger injured by ordinary negligence, while traveling on a strictly gratuitous pass, is a protection to the company. The Supreme Court of the United States, in *Northern Pacific Railway v. Adams*, 24 Sup. Ct. 410, 48 L. Ed. 513 (citing cases, which was affirmed in *Boering v. Chesapeake Beach R. R. Co.*, 24 Sup. Ct. 515, 48 L. Ed. 742), takes the view that such a contract by a passenger traveling gratuitously protects the company from injuries resulting from ordinary negligence; but no case has been cited, and we have discovered none, which holds that such a contract would protect a carrier from the consequences of its wanton and willful disregard of duty. A railroad company owes it to a bald trespasser to do him no willful injury, and to a mere licensee it owes the duty of exercising ordinary care. It would be contrary to public policy to sustain a contract in so far as it sought to exempt for willful misconduct. We have not referred to the

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case of Nickles v. Seaboard Air Line Ry., 74 S. C. 102, 54 S. E. 255, as the court held that the pass under consideration was not strictly a free pass. As the case before us does not call for our determination whether such a contract by a gratuitous passenger would exempt the company from negligence, we refrain from expressing an opinion on that point. We merely hold that appellant has no ground for complaint, as the charge exempted from liability except in cases of willful misconduct.

The judgment of the circuit court is affirmed.

DELAWARE, L. & W. R. Co. v. KUTTER *et al.*

(Circuit Court of Appeals, Second Circuit, May 22, 1906.)

[147 Fed. Rep. 51.]

Appeal and Error—Case Tried to Court—General Finding—Matters Reviewable.—When, upon a trial without a jury in a federal court, the findings of fact and of law by the court are general, exceptions to a ruling denying a motion for judgment for the defendant present for the consideration of an appellate court the question whether upon the whole evidence, with all the inferences which a jury could justifiably draw from it, the plaintiff was entitled to recover; the general finding is to be accepted as equivalent to the verdict of a jury on all matters of fact, and the appellate court cannot review the weight of the evidence.

Judgment—Matters Concluded—Second Action on Different Demand.—When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action, and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence; but every matter necessary to the disposition of the case as made by the pleadings is included in the conclusive effect of the judgment.

Same.—An action to recover a sum of money alleged to be due from defendant to plaintiff under a contract, and a subsequent action for wrongful termination of the contract by defendant, although based upon the same contract, are upon different demands, and where the only defense pleaded in the first action was a breach of the contract by plaintiff, a judgment in his favor therein is conclusive only upon that question in the second action, unless it is shown that other matters were actually litigated and decided.

Railroads—Contract to Secure Traffic—Validity—Monopolies—Carriers—Undue Preference.*—Defendant railroad company entered into

*For the authorities in this series on the question, what is, and is not, discrimination in rates forbidden by the interstate commerce act, see foot-note appended to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* (Miss.), 12 R. R. R. 471, 35 Am. & Eng. R. Cas., N. S., 471.

For the authorities in this series relating to ultra vires acts and

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a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business and was to receive as compensation a percentage of the freights earned therein. It was provided that he should charge rates not in excess of those charged by competitive roads, and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and plaintiff was not given a monopoly of the milk traffic. Held, that such contract was not ultra vires nor void as contrary to public policy, especially as practically construed by the parties in its execution; nor was it in violation of the antitrust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] or of section 3 of the interstate commerce act of Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155] as giving an undue and unreasonable preference to plaintiff.

Contracts—Rules of Construction—Legality.—The fundamental rule is that a contract will be construed, if possible, as having been made for a legal, rather than for an illegal, purpose and it should not be relaxed when a vicious construction is sought for by the party who made the contract.

In Error to the Circuit Court of the United States for the Eastern District of New York.

W. D. Guthrie and H. D. Hotchkiss, for plaintiff in error.
Augustus Vaulbyck, for defendants in error.

Before WALLACE, LACOMBE and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below, and by this writ of error seeks to review a judgment for the plaintiffs in an action tried by the court without a jury. The action was brought to recover damages for the breach by the railroad company of a contract dated July 9, 1886, made with Robert E. Westcott, which was to remain in force for the term of 10 years, and the duration of which was extended September 30, 1892, for the further term of 5 years.

By the terms of the contract Westcott undertook to use his best endeavors "to build up, develop, increase, facilitate, and conduct the business of transportation of milk" over the lines of the defendant's railroad; that he would be wholly responsible for the milk transported over said lines, and save the defendant harmless from all claim arising from or connected with the milk business, except those from accidents and casualties to its trains or its

contracts of railroad companies, see foot-notes appended to *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (Md.), 19 R. R. R. 581, 48 Am. & Eng. R. Cas., N. S., 581.

For the authorities in this series on the subject of the legality of combinations between carriers, etc., see foot-notes appended to *Ft. Worth, etc., Ry. Co. v. State* (Tex.), 18 R. R. R. 352, 41 Am. & Eng. R. Cas., N. S., 352; foot-note appended to *State v. Missouri, etc., Ry. Co.* (Tex.), 18 R. R. R. 800, 41 Am. & Eng. R. Cas., N. S., 800.

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own negligence; that he would save the defendant harmless from all liability for loss of life or injury to any person doing business over its lines on his account; that he would not charge for transportation of milk "rates in excess of those charged by competitive railroads for similar services"; and that he should monthly pay over to the defendant 80 per cent. of all charges collected by him for the transportation of milk during the preceding month, retaining 20 per cent. thereof in full compensation for his own services. The defendant on its part undertook to receive, load, and transport, at and from all stations on its lines, all the milk furnished at said stations for transportation, and to transport the same upon its trains at such times as might be best calculated to promote its business; that it would not permit any of its agents or servants to do any act to prevent or interfere with the developing, building up and conducting of the milk business of Westcott, and would grant him the exclusive privilege of transporting milk over its said lines "so far as it was permitted to do so by law"; that it would furnish sufficient depot accommodations for the conduct of the milk business, render such assistance to the messengers of Westcott accompanying the milk trains as might be necessary for the prompt loading and unloading of such milk, and promptly retransport and return to the several stations the empty milk cans used in the transportation of the milk. The contract was by its terms "subject to revision after three years, and at the end of any one year thereafter on giving three months' notice," and in case of any difference between the parties, provided for a submission to arbitration.

By its answer the defendant admitted the execution of the contract and alleged as a justification for terminating it (1) that the contract was ultra vires, and contrary to public policy; (2) that it was made in violation of the acts of Congress known as the "Anti-Trust Act" and the "Interstate Commerce Act"; and (3) that Westcott had violated the contract by entering into other contracts with competitive railroads inconsistent with his duty to the defendant and the obligations of his contract.

The plaintiffs by their reply to the answer set up as a bar to the defense alleged by the defendant the estoppel of a former adjudication in an action between the parties in the Supreme Court of the state of New York.

The trial judge did not make special findings of fact or of law, but made a general finding that the plaintiffs were entitled to recover \$137,853, and interest and ordered judgment accordingly.

The evidence upon the trial was sufficient to establish the following facts: Before the contract was made the milk traffic of the defendant was of insignificant volume. Westcott immediately proceeded to create and develop it. His plan of operation was to establish creameries contiguous to the lines of the defendant, and procure proprietors who would purchase the milk of the farmers in the vicinity, prepare it for market, and ship it by the defendant's lines to New York City to their own consignees. In carry-

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ing out these operations he caused creameries to be built, costing from \$1,800 to \$3,000 each, at all available places along the lines of the defendant, advancing his own money to do so when necessary, and secured purchasers or lessees of the creameries who became the proprietors, and who bought the milk of the farmers, and shipped it to New York. The freight rates to these shippers were always fixed by the defendant until 1897, when the defendant adopted the rates recommended by the Interstate Commerce Commission, but Westcott collected the freight and paid over monthly to the defendant its proportion thereof. He employed messengers who assisted in loading the milk upon the trains, cared for it en route, helped to deliver it to the consignees, and who after it was delivered returned the empty cans to the trains of the defendant to be sent back to the points from which they had been previously shipped. By Westcott's exertions and the investment of a large amount of his own money, he secured a milk traffic for the defendant which in 1899 had become very extensive.

While developing this traffic Westcott entered into similar contracts with other railroad companies having lines connecting with the defendant's lines, and built up a milk traffic on these lines which became a feeder of the defendant's traffic. After this traffic had been developed, the defendant ran its milk cars over the lines of the other companies, collected the milk at the various stations on their lines, and transported it to its own line and thence by its own line to New York, charging a through rate for all shipments, which was divided upon a mileage basis between the defendant and the other companies. The first of these contracts was between Westcott and the Delaware & Hudson Canal Co., of the date of February 19, 1891; the second was between Westcott and the Cooperstown & Charlotte Railroad Co., the road of which was a branch of the Delaware & Hudson Canal Co., of the date of June 1, 1893; the third was between Westcott and the Elmira, Cortland & Northern Railroad Co., the road of which was a branch of the Lehigh Valley Railroad Co., of the date of August 18, 1893.

During the first six years of the business the outlay and expenses of Westcott, in carrying out the contract were about \$200,000, and his commissions were something less than \$155,000; but by March, 1899, the contract had become very valuable to him. At that time Mr. Sloan, who had theretofore been president of the defendant, was succeeded by Mr. Truesdale. Very shortly after Truesdale became president he notified Westcott that he was dissatisfied with the contract. Several interviews took place between Truesdale and Westcott, the last being in July, 1899. In the course of these interviews Truesdale insisted that the contract was too profitable to Westcott, and his percentage must be reduced; and met Westcott's claim to the stipulated percentage by asserting in substance: "Contracts made before my coming do not stand." Truesdale also insisted that the freight should be

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collected directly by the defendant, and although this change of method involved a considerable loss by way of interest upon his bank account to Westcott, the latter consented. Thenceforth, the freight was collected by the defendant. During these interviews Truesdale raised no objection to the so-called competitive contracts into which Westcott had entered with other railroad companies, although all of them were known to Truesdale, having been shown to him by Westcott.

Among these contracts, besides those which have been mentioned, was one made between Westcott and the New York Central & Hudson River Railroad Co., of the date of July 1, 1896, by which Westcott undertook to develop a milk traffic for the lines of the West Shore Railroad, of which the New York Central Company was the lessee, and another was between the same parties and of the date of July 1, 1898. Both of these contracts related to territory which was not contiguous to the defendant's lines; and when they were made there were no more places along the defendant's lines where creameries could be located advantageously. The first provided by its explicit terms for a future contract such as was embodied in the second. Its terms were considered by the president of the defendant, and by the general manager and the general freight agent of the defendant. It was entered into and performed by Westcott with the sanction of President Sloan, and was not regarded by Westcott or the officers of the defendant as relating to competitive traffic. Neither contract had any practical tendency to divert traffic from the defendant, because the New York market, to which the milk was to be carried, was so extensive that the additional supply would have no appreciable effect in influencing the demand. That market absorbed a steadily increasing supply; the supply for 1901 being practically a quarter greater than in 1897. That the defendant did not lose any traffic in consequence of these contracts is plain. Until Truesdale terminated the contract with Westcott the defendant's traffic had steadily increased; afterwards it decreased. The cause of this decrease is explained by the fact that the Lehigh Valley Railroad Company and the Delaware & Hudson Canal Co., as soon as they found that Westcott was no longer in charge of the defendant's milk traffic, discontinued routing over the defendant's lines the milk traffic from the Elmira, Cortland & Northern Railroad and the Cooperstown & Charlotte Railroad, thus diverting from the defendant's line during the first year after the termination of the contract nearly a third of its entire milk traffic.

February 1, 1900, Truesdale, as president of the defendant, notified Westcott that the contract would be treated as no longer in force, assigning as the only particularized reason that Westcott had violated his contract by entering into similar contracts with other railroad companies, competitors of the defendant, with the purpose and effect of diverting the milk traffic from its railroad to the other railroads. At the same time the defendant notified

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shippers that it had terminated all relations with Westcott, and excluded his messengers from his cars. Thenceforth, the defendant assumed exclusive control of the milk traffic over its lines.

When the contract was terminated the defendant had in its hands the freight moneys which it had collected since July 1, 1899. Upon its refusal to pay over to Westcott his proportion of these moneys Westcott assigned his demand to one Paul. In February, 1900, Paul, as assignee of Westcott, brought an action in the Supreme Court of the state of New York to recover the amount, alleging as the cause of action the terminated contract, the collection of the freight by the defendant from July 1, 1899, to February 1, 1900, and the refusal of the defendant to pay over to Westcott his percentage thereof. The defendant contested the action, and set up as a defense in its answer that it was not liable to Westcott under the terminated contract because he had violated the covenant therein contained to use his best endeavor to build up, develop, increase, and conduct the business of transportation of milk over the defendant's railroad, and, in disregard of his covenant, had endeavored to and did permanently divert the milk traffic from the defendant's lines and turn the same over to other and competitive railroads. The answer further alleged that in violation of the said covenant Westcott had entered into the two contracts with the New York Central & Hudson River Railroad Co. which had been referred to. The action was brought to trial in June, 1901, and a verdict rendered therein for the plaintiff for \$77,648. Thereafter judgment was duly entered in that action, and upon an appeal by the defendant to the Appellate Division of the Supreme Court of New York the judgment was affirmed.

The present action was brought after the expiration of the contract term. At the time of the trial the amount owing from the defendant for the percentage arising to Westcott under the contract, less the amount which it would have cost Westcott to perform his part of the contract, was that found by the trial judge.

Besides the facts which have been mentioned it was shown upon the trial that Westcott had made another so-called competitive contract, the existence of which does not appear to have been known to Truesdale when the latter terminated the contract. This contract was made with the Delaware & Hudson Canal Co., August 21, 1899. His earlier contract with that company, that of February 16, 1891, related to the development of the milk traffic upon and along one of the lines of the company known as the "Albany & Susquehanna Division"; and among other things it provided that at the expiration of five years the railroad company should have the right to readjust any of the terms of the contract, excepting only those fixing the percentage of revenue payable to Westcott. While this contract contemplated that the traffic developed should be carried by the company to Binghamton, where its line connected with the defendant's line, and thence by the defendant's line to New York City, it provided that the company should have the right to transport "milk and other dairy products

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to Albany, and ship dairy products to New York via Albany." In August, 1899, that company decided to develop a milk traffic upon other of its lines, and Mr. Young, its president, entered into negotiations with Westcott for that purpose. Westcott objected to making any new arrangement which would divert the milk traffic of the Albany & Susquehanna division from the defendant's lines at Binghamton, but Young insisted that under the existing contract his company was entitled, if it desired, to ship to New York via Albany. At the same time Young promised that until the termination of the existing contract his company would continue to carry the traffic of the Susquehanna division via Binghamton. These negotiations resulted in the new contract. Although the contract permitted the company to carry the traffic via Albany, no change was in fact made in the mode of conducting it until after the defendant terminated its contract with Westcott, but all the milk shipped on the Albany & Susquehanna division, was transported to Binghamton as before.

Upon the facts thus presented, the defendant upon the trial moved the court for a judgment in its favor upon the grounds that the defense alleged in its answer had been established, and that there was no evidence to support a judgment for the plaintiff. The assignments of error are based upon the exceptions taken by the defendant to the refusal of its motion.

When, upon a trial without a jury, the findings of fact and of law by the court are general, the exceptions to a ruling denying a motion for judgment for the defendant present for the consideration of an appellate court the question whether upon the whole evidence, with all the inferences which a jury could justifiably draw from it, the plaintiff was entitled to recover. The general finding is to be accepted as conclusive upon all matters of fact, and as equivalent to the verdict of a jury, and the Appellate Court cannot review the weight of the evidence. *Lancaster v. Collins*, 115 U. S. 225, 6 Sup. Ct. 33, 29 L. Ed. 373; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373.

In the present case a jury would have been justified in finding—and it is to be presumed in support of the general findings that the court found—that the defendant, at the instigation of its president, Truesdale, had arbitrarily and dishonorably repudiated a contract which both parties had performed for six years, which they had then extended for nine years more, which they had then performed for seven more years, and which the defendant had regarded as fair and reasonable, when Truesdale, having determined to end it because it was too profitable to Westcott, and having cast about for an excuse, assigned one which was unfounded. If Truesdale had really believed the so-called competitive contracts were really competitive, it is extremely improbable that he would not have said so in the interviews with Westcott after they had been brought to his attention, and when he was insisting that Westcott should abate his commission. However

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this may be, the justification assigned by Truesdale for terminating the contract was not valid if these contracts were not entered into by Westcott for the purpose of diverting the milk traffic of the defendant, and did not have any such effect. The contract between Westcott and the defendant did not obligate Westcott to give his whole time and personal services to the business of the defendant or to the business of developing its milk traffic, or not to engage in other business. If it is true, as it may be assumed the court below found, that when the two other contracts were made the milk traffic of the defendant had been fully developed so far as it depended upon his efforts, and the development of a similar traffic in behalf of the New York Central & Hudson River Railroad would not, in view of the sources of supply and demand, practically interfere with the milk traffic of the defendant, there was no breach of obligation on the part of Westcott.

If it had been proved that Westcott had violated the contract by any act which tended to diminish the milk traffic of the defendant, it would be quite immaterial that Truesdale or the defendant assigned a wrong reason for terminating it, and there would have been a meritorious defense to the action. So, also, if the contract was *ultra vires*, or illegal, the defendant was at liberty to repudiate it so far as it remained executory, although its conduct was despicable in adhering to the contract during the many years when it was profitable, and repudiating it only because it could make more money by doing so.

The judgment in the former suit estops the defendant from again litigating the defense that Westcott had violated the contract; but it does not estop the defendant from the benefit of the other defenses which have been interposed, because there was no evidence in the court below that these defenses were litigated in that action. The cause of action for the money in the hands of the defendant, which it had collected as the percentage of Westcott under the contract, was for a different demand than that involved in the present action. When a judgment in an action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. The operation of a judgment upon the demand involved in the action in which the judgment was rendered, and its operation as an estoppel in another action between the parties upon a different demand, are essentially different. So far as the demand involved in the first action is concerned, the judgment closes all controversy; its validity is no longer open to contestation, whatever might have been alleged or proved against it at the trial. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it. But in a subsequent action between

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the same parties upon a different demand, it is an estoppel only upon the matter actually controverted and determined in the former action. The circumstance that both demands arise from the same contract is not controlling, and does not tend to establish their identity. *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Sparhawk v. Wills*, 72 Mass. 163; *Andover Savings Bank v. Adams*, 83 Mass. 28. *Perry v. Dickerson* is precisely in point. There the plaintiff had brought an action to recover damages for an alleged wrongful dismissal from the defendant's employment before the expiration of the stipulated time, and had recovered judgment therein. He brought a second action to recover wages earned during the time he was actually employed, and due and payable before the wrongful dismissal. The court held that the two claims constituted separate and independent causes of action, and that the former judgment was not a bar in the second. If the demand in the former action had been the same as in the present, it would have been merged in the former judgment and the present action for that reason could not have been maintained. The general doctrine applicable to cases like the present is stated in *Russell v. Place*, *supra*, as follows:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example if it appear that several distinct matters may have been litigated, upon one or more of which judgments may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the principal point involved and determined."

See *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956.

In the present case, although the record does not specifically denote the grounds of the decision in the former action, it does disclose what issues were litigated and what must have been decided in order to result in a recovery for the plaintiff. There is included in the conclusive effect of a final adjudication every matter necessary to the disposition of the controversy as made by the pleadings; and if the determination of a question is necessarily involved in the judgment, it is immaterial whether it was actually litigated or not. *Freeman on Judgments*, § 272 (4th Ed.). "The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at

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issue in the cause, and was determined therein." See *Aurora City v. West*, 7 Wall. 103, 19 L. Ed. 42; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 398, 17 Sup. Ct. 905, 42 L. Ed. 202.

The defendant contested the right of the plaintiff to recover on the allegations that Westcott had violated his covenant to use his best endeavors to build up and increase the milk traffic of the defendant, and had diverted that traffic to other and competitive railroads. Its answer did not allege the invalidity or illegality of the contract. The only issue presented by the pleadings was whether or not Westcott had been guilty of a breach of the contract. The adjudication against the defendant necessarily decided that he had not, as that was the only issue presented for the consideration of the court. If the validity, or the legality of the contract, was drawn in question in any manner upon the trial, the fact was not proved in the court below, and certainly cannot be inferred from the pleadings and the judgment.

Inasmuch as the former judgment concludes the defendant upon the issue tendered by its answer in that action, and estops it in the present action from asserting that Westcott violated his covenant by diverting, or endeavoring to divert, the milk traffic from the defendant to other railroad companies, or from asserting that he violated the covenant in any other way, it is unnecessary to consider whether any of the contracts made by him were theoretically competitive, or were upon any considerations violative of the contract; and it is quite immaterial whether the evidence introduced upon that issue in the trial of the former action is or is not the same as was introduced upon the trial of the present action.

If the contract was *ultra vires*, it was not so in the narrow sense of the term, but in the sense that its performance would involve a wrongful perversion of the powers conferred upon the corporation. An implied condition attaches to all legislative grants of corporate powers that they are conferred not merely as the privilege of the recipient to be used at its discretion, but as a quasi trust to be exercised for the benefit of the public as well. Consequently any contract of a corporation by which it disables itself from performing its duties to the public, or subordinates to its private interest the rights and conveniences which it impliedly undertakes to secure to the community, is beyond the lawful power of the corporation. Such a contract is contrary to public policy, and is invalid on that ground also. The concrete inquiry in the present case is whether the necessary tendency of the contract was to disable the defendant from performing its obligations to the public by depriving shippers of milk of some of the rights or privileges to which they were entitled at the hands of a railway carrier. If it did not have that tendency, it could not operate to restrain trade; and if it did not contravene some statutory prohibition, it was in all respects a legitimate corporate act.

The contract doubtless contemplated such a business relation

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and arrangement between the parties as followed its execution. Its purpose, so far as the defendant was concerned, was to enable the defendant to acquire a traffic which would have to be created, and which could not be satisfactorily built up and developed by the ordinary agencies of the defendant, and which the defendant conceived required the co-operation of Westcott. The peculiar conditions of the undertaking necessitated risks and responsibilities which the defendant was unwilling to assume, and the traffic could not be successfully developed and retained unless it was conducted with such a just regard to the interests of shippers as to be advantageous to them as well as to the defendant. In order to obtain this traffic without investing its own resources, and to carry it on with a minimum of inconvenience, expense, and risk to itself, the defendant saw fit to engage Westcott, and to put him in practically exclusive charge of the whole undertaking, upon terms and conditions which would be likely to be mutually advantageous to both parties. All this was in furtherance of its own business; and the remuneration Westcott was to receive, and the duration of the arrangement, were matters which concerned none but the parties to the agreement and which they were at liberty to settle between themselves. It cannot be questioned that railroad companies may lawfully make all necessary arrangements for increasing their own business and for expeditiously and economically carrying it on. *United States v. D. L. & W. R. R. Co.* (C. C.) 40 Fed. 101; *Barney v. Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115. It is certainly competent for a railroad company to employ a traffic manager, and give him exclusive charge of that branch of the business to which his duty relates, and to contract with him for a specified period of service, and pay him a commission by way of compensation. It is likewise competent for a railroad company, in the absence of any legislative prohibition, to make an agreement with the producer or shipper of a particular class of shipments, for good and sufficient reasons to carry them on any terms which the company may deem reasonable. *Fitchburg R. R. Co. v. Gage*, 12 Gray (Mass.) 393. As was said by the Supreme Court of Ohio in a case where the contract was to carry for a manufacturer at a fixed rate for a term of 10 years:

"We have a right to assume that the contract was to the mutual advantage of both parties, that it was made in good faith, and that its performance for the whole term would not have been injurious to the interests of the stock-holders, or in any way suspend or abridge the powers conferred on the corporation to discharge the duties owed to the public as a common carrier for all on equal terms." *Railroad Co. v. Furnace Co.*, 37 Ohio St. 321, 41 Am. Rep. 509.

The contract treats Westcott, not only as the manager of the defendant in developing and conducting its milk traffic, but also as a representative of the shippers who was entitled to have every reasonable accommodation afforded to them and to himself in aid

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of the defendant's covenants to facilitate the traffic. It has but two features which are open to criticism as tending to deprive shippers of some of their rights and privileges, or to favor Westcott at their expense. The provision that Westcott will charge for the transportation of milk rates not in excess of those charged by competitive railroads for similar service suggests that he is to be permitted to fix the rates subject to that restriction. If he could fix the rates solely as his own interests might dictate, it would be open to him to make rates prejudicial to the traffic or to particular shippers. But the limitation itself provides an ample protection against such an abuse of his authority, as no shipper would have just cause to complain unless his rates were in excess of the common standard for similar services. The contract does not in terms authorize Westcott to fix the rates, and may fairly be construed as intended to give him the usual authority of a manager to do so in first instance, and subject to revision by the company. The construction placed upon it by the acts of the parties themselves negatives the inference that it was intended to delegate the ultimate power to Westcott, as from the inception of the arrangement the rates were always fixed by the defendant. Where the terms of a contract are equivocal the practical construction given to it by the parties themselves is very persuasive of its real meaning. The other provision open to criticism is that which gives to Westcott the exclusive privilege of transportation. But this provision also is carefully qualified so that it may not be construed as encroaching upon the legal duty of the defendant to other shippers. There seems to be no fair reason to infer that the qualifying terms of this provision were artfully employed to mask the purpose of the parties to give Westcott a monopoly of the milk traffic. None was actually ever given to him. It may be read as an amplification of the preceding part of the covenant by which the defendant obligates itself not to permit anything to be done on the part of its agents or servants which will interfere with Westcott's conduct of the business. The ingenuity of counsel for the plaintiff in error has been strenuously exerted in the effort to provert a contract which is capable of an innocent meaning into one which was devised to effect iniquitous ends by devious means by their own client. The fundamental rule is that a contract will be construed, if possible, as being made for a legal rather than for an illegal purpose. *Hobbs v. McLean*, 117 U. S. 569, 6 Sup. Ct. 870, 29 L. Ed. 940; *United States v. Railroad Co.*, 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173. Its application certainly should not be relaxed when a vicious construction is sought for by the party who has made the contract; and especially in a case like this where it appears that at least three other railway corporations had entered into similar contracts. Looking at all its provisions, the contract is one which is not obnoxious to any just criticism. It is analogous in some respects to that which was before the court in *Chicago, etc., R. R. Co. v. Pullman Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97, where it was

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alleged that the agreement sued on was void as against public policy because of the exclusive rights given to the plaintiff for the term of 15 years in respect to drawing room and sleeping cars furnished by plaintiff to the defendant, supplemented by the stipulation that the defendant would not contract with any other party to run that class of cars over its road during the period of 15 years. The court said:

"The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of the passenger traffic. Its duty, as a carrier of passengers, was to make suitable provision for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business it was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing room and sleeping cars, it was a matter of indifference to the public who owned them. * * * We are of opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing room and sleeping cars to be used by its passengers, and, as a means to induce the plaintiff to perform this public service and to incur the expense and hazard incident thereto, from giving it an exclusive right to furnish cars for that purpose. * * * The suggestion that the agreement is void, upon grounds of public policy, or because it is in general restraint of trade, cannot for the reasons stated, be sustained."

The contention that the contract was void by the act of Congress (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) to "protect trade and commerce against unlawful restraints and monopolies," may be briefly disposed of. The contract undoubtedly operated upon interstate commerce as well as upon interstate traffic; but if the views which we have expressed are correct as to its meaning and effect, it did not have any tendency to create a monopoly, or evidence any conspiracy in restraint of trade. It could only operate in restraint of trade by permitting Westcott to charge such extortionate rates to milk shippers as would discourage shippers; and this it did not permit or contemplate.

The contention that the contract contravened the provisions of the interstate commerce act may likewise be briefly disposed of. The argument for the plaintiff in error is that the contract is obnoxious to section 3 of that act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) because it gave an undue and unreasonable preference to Westcott in the business of transporting milk. That act deals with the effects or results of contracts, and has no operation directly upon the contracts

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themselves; but assuming that the contract is void if the contention that it gave an undue and unreasonable preference is sound, the case is not one where any such preference was given. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. *Wight v. United States*, 167 U. S. 516, 17 Sup. Ct. 822, 42 L. Ed. 258. The mere circumstance that there is, in a given case, a preference or advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. *Texas & Pacific R. R. Co. v. Interstate Commerce Com.*, 162 U. S. 219, 220, 16 Sup. Ct. 666, 40 L. Ed. 940. To come within the inhibition of the act "the positions of the respective persons or classes between whom difference in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other." *Interstate Commerce Com. v. B. & O. R. R.*, 145 U. S. 263, 282, 12 Sup. Ct. 844, 36 L. Ed. 699. Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the interstate commerce act "leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." *Interstate Commerce Com. v. Alabama Mid. R. R. Co.*, 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453; *Id.*, 168 U. S. 144; 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The privileges accorded to Westcott were only those which were incident to the anomalous relations existing between him and the defendant created by the contract. It is quite inconceivable that there were or could have been any shippers of milk who would have been willing or able to undertake his duties and responsibilities. In consideration of his assumption of peculiar obligations and hazards, the defendant gave him exceptional privileges appertaining to his relation as a manager of the traffic; this was not an undue and unreasonable preference.

The assignments of error which have been considered are the only ones which have been argued at the bar or on the brief of counsel. The repudiation of the contract was without any justification, for even if the contracts with the New York Central Railroad Company were theoretically competitive, they had been consented to by the officers of the defendant. The repudiation, as has been said, was announced when the contract had nearly

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expired, and when the defendant would shortly have secured exclusively for itself all the profits of the valuable traffic built up by Westcott. It was repudiated for sordid motives, and with an arrogance born of the scorn of consequences. The appropriation of Westcott's percentage of the money, which the defendant had actually collected for him, was morally no better than larceny. although Truesdale was primarily responsible for this conduct, and the directors of the defendant may not have been personally cognizant of it, they cannot escape their share of the moral responsibility which ensues from endeavoring to establish the defenses interposed in the earlier action and in this action. It is conduct like Truesdale's, by those who manage the affairs of great corporations, that has aroused the spirit of resentment in the public mind which is so intense today, and which is not unlikely to result in legislation, and in municipal interference which will bring serious loss upon stockholders.

We find no error in the rulings of the court below, and the judgment is accordingly affirmed.

GATES v. BEKINS.

(Supreme Court of Washington, Nov. 15, 1906.)

[87 Pac. Rep. 505.]

Damages—Subjects of—Outraging of Feelings—Carriers—Refusal to Deliver Goods.*—In an action against a carrier for conversion of household goods in refusing to deliver them until payment of certain charges claimed to be due for their carriage, recovery cannot be had for the outraging of feelings.

Carriers—Refusal to Deliver Goods—Action for Conversion—Tender.—Where, on a dispute between a carrier and the owner of certain goods as to the amount due for their carriage, the carrier withheld them until the amount claimed by him to be due should be paid, a tender was not necessary before bringing suit for their conversion, where there was no refusal by the owner to pay what he deemed a proper amount.

Trial—Instructions—Applicability to Evidence.—In an action against a carrier for conversion of goods, an instruction authorizing the recovery of damages for injuries concerning which there was no evidence, is erroneous.

*For the authorities in this series on the subject of the right to recover special damages from a carrier of freight for loss or injuries from delay, see foot-note appended to *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 20 R. R. R. 727, 43 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679; foot-notes appended to *Southern Ry. Co. v. Webb* (Ala.), 20 R. R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26.

Gates v. Bekins

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by B. E. Gates against Daniel Bekins, doing business as the Bekins Moving & Storage Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Craven & Totten, for appellant.

Sweeney & Steiner, for respondent.

DUNBAR, J. This was an action for the conversion of household goods of the alleged value of \$121 brought by respondent against appellant; the appellant defending upon the ground that the alleged conversion was simply the rightful detention of the goods under a lien belonging to him by virtue of an express contract, and also by virtue of the fact that he was a common carrier, to secure the payment of \$20.75 due for carriage charges on the goods and other goods carried at the same time. Appellant was engaged in the business of moving and storing goods in the city of Seattle. The complaint, among other things, alleges that plaintiff has demanded of defendant that he deliver the remainder of said household goods as per agreement, which defendant has refused and still refuses to do; that the plaintiff is ready, and at all times has been ready to pay any and all bills presented to him for such services as per his contract with the defendant, and has so informed the defendant; that, in addition to the value of the household goods appropriated by the defendant to his own use and benefit, plaintiff has been damaged in his business in the sum of \$1,000; and that his feelings have been outraged. We may say here that this is a straight business transaction in which the outraging of feelings necessarily cannot be involved. The case was tried by a jury, and the verdict was rendered in favor of the plaintiff, the respondent here, for \$621. Appellant's motion for a new trial was denied upon condition that the respondent remit \$270.75 from the judgment which said reduction was accepted by respondent. Judgment was then rendered for \$330.25, from which judgment this appeal is taken.

The first contention in this case is that the court erred in instructing the jury as follows: "If, on the contrary, you find that the agreement was that he should hold a portion of the goods until the charges for the carriage on them should have been paid, then the plaintiff would not be entitled to recover unless you find that the defendant demanded excessive charges—more than he was entitled to under the contract. I instruct you in that respect that if a common carrier of goods demands a sum in excess of the amount due him for freight charges, the assignee or owner of the goods may maintain an action of this kind against him without making a tender of any part of the amount"—the contention of the appellant being that it was necessary as a prerequisite to the commencing of this action, that the respondent should have tendered the amount due for the carriage of the goods. Upon this subject of tender there is a conflict of author-

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ity; some courts holding that it is necessary for the consignee to tender the amount which he considers right for the carriage of the goods before he can legally commence an action for recovery, others, that a tender is not necessary, especially where there is a controversy as to the amount of freight which is due the carrier, and where the carrier has declined to take less than the charges which he has presented, or where by his actions and claims it is manifest that it would be useless for the consignee to tender any amount less than that which was claimed by the carrier. This court held, in *Moran Bros. Co. v. Northern Pacific R. R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101, that: "Where the carrier demands a sum in excess of the sum due for freight charges, the consignee need not tender any sum before bringing suit." This decision is criticised by the appellant, for the reason that the statement of law announced in that case was not necessary to the decision on the issues involved, and there is some merit in this criticism. To sustain that doctrine we cited *Adams v. Clark*, 9 Cush. (Mass.) 215, 57 Am. Dec. 41; *Isham v. Greenham*, 1 Handy (Ohio) 357. It is also contended by the appellant that *Adams v. Clark* does not sustain the law as announced by the court. But an examination of that case convinces us that while there were some other features in the case which were incidentally passed upon by the court, the law on this question was announced to the effect that tender is not necessary. The court, in passing upon the question at issue said: "If the defendants illegally withheld the goods from the plaintiff, he might have brought an action of assumpsit against them, as well as this action of trover. And, in that action, all that it would have been necessary for him to aver and prove would have been his readiness to pay the freight, upon delivery of the goods. * * * And we are of opinion that all which it was necessary for the plaintiff to prove, in order to maintain this action, was his readiness to pay freight on the goods, upon their being delivered to him, and the defendants' refusal to deliver them unless something more should be first paid." In *Isham v. Greenham*, 1 Handy (Ohio) 358, it was held that the duties of the carrier and consignee are correlative; the one to deliver, and the other to pay the freight being mutual acts. In that case the court said: "On general principles, whenever the act of one party to whom another is bound to tender money, services, or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from the technical performance of his agreement. The law never requires a vain thing to be done. * * * It would have been useless, then, for the plaintiff to have tendered the amount due as freight when he had already been told that it would not be accepted. The claim asserted by the defendant was illegal, and having refused to deliver the cargo, unless that claim was paid, the plaintiff had nothing to do but to regard the carrier's act as unlawful, and hold him responsible for the value of the property in tort." The case at bar presents this identical state of facts. A controversy

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arose between the appellant and the respondent as to the amount which was due the appellant under the contract for the carriage of the goods. There was no refusal on the part of the respondent to pay what he deemed was the proper amount for the service rendered. A greater amount was claimed by the appellant, and the goods were withheld from the possession of the respondent until that greater amount was paid, and it would have been useless, as shown by the undisputed testimony in this case, for the respondent to have tendered any less amount than that which was claimed by the appellant, so that the respondent had a right to bring this action and submit this question, together with the other disputed questions in the case to the court. In *Long v. Mobile & Montgomery Railroad Co.*, 51 Ala. 512, a case cited by the appellant, it seems to us the proper rule is laid down, namely, that the payment of the freight and the delivery of the goods are concomitant or concurrent acts; and, if the consignee is ready and willing to pay the freight due, on having the goods delivered to him, and the carrier refuses to deliver them unless he will pay more than is due, the consignee may maintain detinue for the goods, or trover for their conversion, without making a formal tender, or paying the money into court. The amount of freight actually due to be adjusted by the court. The court in this case however instructed the jury as follows: "If you find in addition that the defendant has been otherwise damaged by reason of the taking and detention of these goods directly, then you should award him that amount. Your verdict for the goods alleged to have been taken must not exceed \$121 and for the remainder must not exceed \$1,000; in arriving at a verdict you are to find a verdict in one lump sum."

The giving of this instruction was error, for the reason that there was not a scintilla of testimony offered showing any damage whatever to the business of the respondent, nor was there any attempt on the part of the respondent to make any other proof whatever than the value of the goods detained by the appellant. And that it was prejudicial is plainly shown by the verdict of the jury in returning a larger verdict than the alleged value of the goods detained. On account of this error, it becomes necessary to reverse this cause for the reason that this court cannot determine what conclusion the jury came to concerning the value of the goods detained, as the proof as to their value was conflicting, and it is not ascertainable whether the jury, if it had been proper to exclude all damages excepting the value of the goods detained would have found that the goods were worth the sum of \$121.

For this reason, the judgment will have to be reversed, and the cause remanded, with instructions to grant a new trial.

MOUNT, C. J., and CROW, RUDKIN, FULLERTON, HARDEY, and Root, JJ., concur.

**TERRITORY OF NEW MEXICO *ex rel.* E. J. McLEAN & COMPANY,
Appt. v. DENVER & RIO GRANDE RAILROAD COMPANY.**

(Argued March 14, 15, 1906. Decided October 15, 1906.)

[27 Sup. Ct. Rep. 1.]

Appeal—From Territorial Supreme Court—Federal Question.—A controversy as to the constitutional right of a territorial legislature to pass a specified law under the broad legislative power conferred by U. S. Rev. Stat. § 1851, involves the validity of an authority exercised under the United States within the meaning of the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), § 2, defining the appellate jurisdiction of the Supreme Court of the United States over the supreme courts of the territories.

Appeal—From Territorial Supreme Court—Amount in Dispute.—Some sum or value must be in dispute in order to sustain the appellate jurisdiction of the United States Supreme Court over the supreme courts of the territories which is conferred by the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), § 2, without regard to the sum or value in dispute, in cases involving the validity if a treaty or statute of, or authority exercised under, the United States.

Appeal—From Territorial Supreme Court—Amount in Dispute.—A suit in which the matter in dispute is the right of consignors to have a consignment shipped by a common carrier to its destination involves a valuable right, measurable in money, and therefore satisfies the requirements of the act of March 3, 1885, conferring upon the Supreme Court of the United States appellate jurisdiction over the supreme courts of the territories without regard to the sum or value in dispute, where the validity of a treaty or statute of, or authority exercised under, the United States is involved.

Commerce—Duties on Imports or Exports.—Only articles imported from, or exported to, foreign countries, are within the purview of U. S. Const. art. 1, § 10, forbidding any state, without the consent of Congress to lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.

Evidence—Judicial Notice.—Judicial notice will be taken by the Supreme Court of the United States of the fact that, in the territory of New Mexico and in other similar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country with no other means of determining their separate ownership than by the brand or marks upon them.

Commerce—Territorial Regulation—Inspection Law.*—The prohibition against the receipt by common carriers for transportation be-

*For the authorities in this series on the subject of state regulation of interstate commerce, see foot-notes appended to Railroad Com'rs v. Atlantic Coast Line R. Co. (S. Car.), 20 R. R. R. 745, 43 Am. & Eng. R. Cas., N. S., 745.

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yond the limits of the territory of hides which do not bear the evidence of inspection required by N. M. act of March 19, 1901, is a valid exercise of the police power, and does not—there being no congressional legislation covering the subject and making a different provision—violate the commerce clause of the Federal Constitution, although hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses, and not at all outside of the slaughterhouses, and although the incidental effect of the statute may be to levy a tax upon this class of property.

Commerce—Territorial Legislation—Inspection Fee.*—The amount of the fee imposed by N. M. act of March 19, 1901, for the inspection of hides offered for transportation beyond the limits of the territory, does not render that statute—if otherwise valid—repugnant to the commerce clause of the Federal Constitution, where it is not so unreasonable and disproportionate to the services rendered as to challenge the good faith of the law.

Appeal from the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of Santa Fe County, in that territory, sustaining a motion to quash an alternative writ of mandamus to compel a common carrier to receive for transportation beyond the limits of the territory hides which did not bear the evidence of inspection required by the territorial laws. Affirmed.

See same case below (N. M.) 78 Pac. 74.

The facts are stated in the opinion.

Messrs. William B. Childers and T. B. Catron, for appellant.

Messrs. Charles A. Spiess, A. C. Campbell, and D. J. Leahy, for appellee.

MR. JUSTICE DAY delivered the opinion of the court:

This is an appeal from the judgment of the supreme court of New Mexico, affirming the judgment of the district court of Santa Fe county, sustaining a motion to quash an alternative writ of mandamus issued on the relation of E. J. McLean & Company against the Denver & Rio Grande Railroad Company.

From the allegations of the writ it appears that the relators, the appellants here, had delivered to the railroad company at Santa Fe, New Mexico, a bale of hides consigned to Denver, Colorado, a point on the line of the defendant's railroad. The railroad company refused to receive and ship the hides for the reason that they did not bear the evidence of inspection required by the act of the legislature of New Mexico, approved March 19, 1901, which act, to be more fully noticed hereafter, made it an offense for any railroad company to receive hides for shipment beyond the limits of the territory which had not been inspected within the requirements of the law.

An objection is made to the jurisdiction of this court upon the ground that the case is not appealable under the act of Congress

*See foot-note on preceding page.

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of March 3, 1885. 23 Stat. at L. 443, chap. 355 (U. S. Comp. Stat. 1901, p. 572).

Section 1 of the act provides, in substance that no appeal or writ of error shall be allowed from any judgment or decree of the supreme court of a territory unless the matter in dispute, exclusive of costs, exceeds the sum of \$5,000. Section 2 of the act makes exception to the application of § 1 as to the sum in dispute, in cases wherein is involved the validity of a treaty or statute of or authority exercised under the United States, and in all such cases an appeal or writ of error will lie without regard to the sum or value in dispute.

Confessedly, \$5,000 is not involved; and in order to be appealable to this court the case must involve the validity of an authority exercised under the United States, and also be a controversy in which some sum or value is involved. This court, in the case of *United States v. Lynch*, 137 U. S. 280-285, 34 L. ed. 700-702, 11 Sup. Ct. Rep. 114-116, laid down the test of the right to appeal under the statute in the following terms:

"The validity of a statute, or the validity of an authority, is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

The right to legislate in the territories is conferred, under constitutional authority, by the Congress of the United States, and the passage of a territorial law is the exercise of an authority exercised under the United States. While this act was passed in pursuance of the authority given by the United States to the territorial legislature, it is contended by the relators below, appellants here, that it violates the Constitution of the United States, and is therefore invalid, although it is an attempted exercise of power conferred by Congress upon the territory. The objection of the relator to the law raises a controversy as to the right of the legislature to pass it under the broad power of legislation conferred by Congress upon the territory. In other words, the validity of an authority exercised under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the territory, as was the fact in *Snow v. United States*, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059. The power to pass the act at all, in view of the requirements of the Constitution of the United States, is the subject-matter of controversy, and brings the case in this aspect within the 2d section of the act.

Is there any sum or value in dispute in this case? While the act does not prescribe the amount, some sum or value must be in dispute. *Albright v. New Mexico*, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210. The matter in dispute is the right to have the goods which were tendered for shipment transported to their destination. As a common carrier, the railroad was bound to

receive and transport the goods. Its refusal so to do was based upon the statute in question because of the noninspection of the goods tendered. The relators claimed the right to have their goods transported because the statute was null and void, being an unconstitutional enactment. The controversy, therefore, relates to the right of the appellants to have their goods transported by the railroad company to the place of destination. We think this was a valuable right, measurable in money. At common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily, the measure of damages in such case is the difference between the value of the goods at the point of tender and their value at their proposed destination, less the cost of carriage. We are of the opinion that this controversy involves a money value within the meaning of the statute, and the motion to dismiss the appeal will be overruled.

Passing to the merits of the controversy, Congress has conferred legislative power upon the territory to an extent not inconsistent with the Constitution and laws of the United States. U. S. Rev. Stat. § 1851. It is contended that the act under consideration contravenes that part of article 1, § 10, of the Constitution of the United States, which reads: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." And also that part of the 8th section of article 1 of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, and among the states, and with the Indian tribes.

As to the objection predicated on § 10 of article 1, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345-350, 43 L. ed. 191-193, 18 Sup. Ct. Rep. 862, and cases cited. Moreover, that paragraph of the Constitution expressly reserves the right of the states to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution.

The question principally argued is as to the effect of this law upon interstate commerce, and it is urged that it is in violation of the Constitution, because it undertakes to regulate interstate commerce, and lays upon it a tax not within the power of the local legislature to exact. It has been too frequently decided by this court to require the restatement of the decisions, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress, and that other laws which undertake to regulate such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. ed.

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1142, 26 Sup. Ct. Rep. 722. While this is true, it is equally well settled that a state or a territory, for the same reasons, in the exercise of the police power, may make rules and regulations not conflicting with the legislation of Congress upon the same subject, and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of legislatures having for their object the protection, welfare, and safety of the people, although such laws may have an effect upon interstate commerce. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613-635, 42 L. ed. 878-885, 18 Sup. Ct. Rep. 488; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce. In *Patapsco Guano Co. v. Board of Agriculture*, *supra*, it was directly recognized that the state might pass inspection laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce. The same principle was recognized in *Neilson v. Garza*, 2 Woods, 287, Fed. Cas. No. 10,091,—a case decided by Mr. Justice Bradley on the circuit and quoted from at length with approval by Mr. Chief Justice Fuller in the *Patapsco Case*.

Applying the principles recognized in these cases to the case at bar, does the act in question do violence to the exclusive right of Congress to regulate interstate commerce? We take judicial notice of the fact that, in the territory of New Mexico, and in other familiar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country with no other means of determining their separate ownership than by the brands or marks upon them. In view of these considerations, and for the purpose of protecting the owners of cattle against fraud and criminal seizures of their property, the territory of New Mexico has made provision, by means of a system of laws enacted for the purpose, for the protection of the ownership of cattle and the prevention of fraudulent appropriations of this kind of property. The legislation upon the subject in the territory is thus summarized in the opinion, in this case, of the supreme court of New Mexico (78 Pac. 74):

"The first act relating to inspection of hides was passed in 1884, and provided that all butchers should keep a record of all animals slaughtered, and keep the hides and horns of such animals for thirty days after slaughter, free to the inspection of

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all persons (Comp. Laws, § 84); and provided a penalty for failure to keep the record and the hides and horns (§ 86), and a penalty for refusal of inspection of the record or hides (§ 87). In 1891 all persons were required to keep hides for thirty days for the inspection of any sheriff, deputy sheriff, or any constable, or any board or inspector, or any officer authorized to inspect hides (§ 89), and provided a penalty (§ 90). In 1889, amended in 1895 (Laws 1895, chap. 29, § 4, p. 70), a cattle sanitary board was created (§ 183), with power to adopt and enforce quarantine regulations and regulations for the inspection of cattle for sale and slaughter (§ 184), and pay inspectors not to exceed \$2.50 per day and their expenses (§ 190). In 1891 the cattle sanitary board was authorized and required to make regulations concerning inspection of cattle for shipment, and hides and slaughterhouses (§ 208), and there was provided the details of arrangement for inspection of cattle (§ 212), and the duties of cattle inspectors were enlarged by providing: Every slaughterhouse in this territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such slaughterhouses shall be carefully compared with the records of such slaughterhouses, and a report in writing setting forth the number of cattle killed at any such slaughterhouse since the last inspection, * * * the names of the persons from whom each of said cattle was bought, the brands and marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughterhouse, or any other person, of the provisions of an act entitled "An Act for the Protection of Stock, and for Other Purposes," approved April 1, 1884. For the purpose of making the inspection authorized by this act, any inspector employed by the said sanitary board shall have the right to enter, in the day or nighttime, any slaughterhouse or other place where cattle are killed in this territory, and to carefully examine the same, and all books and records required by law to be kept therein, and to compare the hides found therein with such records' (§ 213). In 1893 it was provided that the cattle sanitary board might fix fees for the inspection of cattle and hides (§ 221) (repealed in 1899 [Laws 1899 chap. 53, p. 107]) and that such fees shall be paid to the secretary of the board and placed to the credit of the cattle sanitary board (§ 222), and shall be used, together with funds realized from taxes levied and assessed, or to be levied and assessed, upon cattle only, to defray the expenses of the board (§ 220). Chapter 44, p. 94, of the Laws of 1899, makes no changes in the law material to the consideration of this case. Section 2, chap. 53, p. 107, of the Laws of 1899, provides a fee of 3 cents for inspection of cattle."

In *pari materia* with this legislation the act of 1901, now under consideration, was passed. Sections 3 and 4 of that act are as follows:

"Sec. 3. Hereafter it shall be unlawful for any person, firm, or corporation to offer, or any railroad company or other common

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carrier to receive, for the purpose of shipment or transportation beyond the limits of this territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof a fee or charge of 10 cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office.

"Sec. 4. Any person, firm, or corporation, common carrier, railroad company, or agent thereof, violating any provision of this act, or refusing to permit the inspection of any hides as herein provided, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding \$1,000 for each and every violation of the provisions of this act."

The purpose of these provisions is apparent, and is to prevent the criminal or fraudulent appropriation of cattle by requiring the inspection of hides and registration by a record which preserves the name of the shipper and purchaser of the hides, as well as the brands thereon, and by which is afforded some evidence, at least, tending to identify the ownership of the cattle. It is evident that the provision as to the shipment of the hides beyond the limits of the territory is essential to this purpose, for if the hides can be surreptitiously or criminally obtained and shipped beyond such limits, without inspection or registration, a very convenient door is open to the perpetration of fraud and the prevention of discovery.

It is argued that this act lays a special burden upon interstate commerce, because, under the law, hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses and not at all outside of slaughterhouses. But legislation is not void because it meets the exigencies of a particular situation. Other statutory provisions apply to property remaining in the territory, where possibly it may be found and identified. When shipped beyond the limits of the territory the means of reaching it are beyond local control, and it is the purpose of §§ 3 and 4 of the act of 1901 to preserve within the territory a record of the brands identifying the property and naming the purchaser or shipper. Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the territory, and that for that reason the tax is an arbitrary discrimination against interstate traffic.

It is urged further that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the territory. It is true that inspection

New Mexico ex rel. McLean & Co. v. Denver, etc., R. Co

laws ordinarily have for their object the improvement of quality, and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the Patapsco Case, *supra*, it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in *Neilson v. Garza*, *supra*, decided on the circuit. We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view. In the territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong.

It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection, which goes into the treasury of the sanitary board, and the allegations of the writ tend to show that an inspector might make a considerable sum in excess of day's wages in the work of inspecting hides under the provisions of this act. The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345-350, 43 L. ed. 191-193, 18 Sup. Ct. Rep. 862.

We are of the opinion that the allegations of the relator as to the cost of inspection, compared with the fees authorized to be charged, and the profit which might accrue to the inspector, in view of other and necessary incidental expense connected with the inspection and registration, do not bring the case within that class which holds that, under the guise of inspection, other and different purposes are to be subserved, thus rendering the legislation invalid.

Upon the whole case, we are of the opinion that, in the absence of congressional legislation covering the subject, and making a different provision, the act in controversy is a valid exercise of the police power of the territory, and not in violation of the Constitution giving exclusive power to Congress in the regulation of interstate commerce.

Affirmed.

TIETZ v. INTERNATIONAL RY. CO.

(Court of Appeals of New York, Nov. 13, 1906.)

[78 N. E. Rep. 1083.]

Carriers—Injuries to Passengers—Acts of Conductor—Negligence.*

—Where a passenger on an electric car while on the running board for the purpose of changing his seat was injured by a collision of his body with one of the trolley poles between the tracks, the conductor's assent to such change of seats without warning the passenger of his danger was not negligence, where the distance between the trolley poles and the car was great enough to enable persons ordinarily to stand upon or pass along the running board in safety, and where the construction of the road at the place where the accident occurred was not unusual, or the distance between the running boards such as was likely to endanger passengers making ordinary and customary use thereof.

Vann, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Frederick W. Tietz against the International Railway Company. From a judgment of the Appellate Division of the Supreme Court (95 N. Y. Supp. 1163), affirming a judgment for plaintiff, defendant appeals. Reversed.

Charles B. Sears, for appellant.

Philip A. Laing and Hamilton Ward, for respondent.

WILLARD BARTLETT, J. This is an action to recover damages for personal injuries sustained by the plaintiff while a passenger upon an electric car operated by the Niagara Falls Park and River Railway Company in the Dominion of Canada on September 10, 1899.

The defendant is the successor in interest of that corporation and no question is raised as to its liability herein in case there is any liability at all. The accident out of which the action arose occurred while the plaintiff was endeavoring to change his seat in the car. For this purpose he stepped down upon the running board, and while there his body was brought into collision with one of the trolley poles between the tracks and he was thrown down and injured. The plaintiff was a large man, weighing 250 pounds, and measuring 24 inches across the shoulders and 20 inches though the body. He had never before visited Niagara Falls, in the vicinity of which the accident occurred. Having crossed

*For the authorities in this series on the subject of negligence in allowing passengers to ride in dangerous places, or otherwise expose themselves to danger, see foot-notes appended to *Bridges v. Jackson Elec. Ry., L. & P. Co.* (Miss.), 16 R. R. R. 512, 39 Am. & Eng. R. Cas., N. S., 512.

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the arch bridge into Canada he took passage on the car, which was bound southward along the edge of the gorge. It was an open car with cross-seats, and one seat at the rear end, facing backward. The plaintiff took this seat within a few feet of the place where the conductor stood. There were no other passengers on that portion of the car. When the car stopped at a place known as the "Dufferin Cafe" many of the passengers alighted, and the plaintiff observed that the two rear seats in the body of the car were vacant. Thereupon he remarked to the conductor: "I see them two rear seats are empty. I will take one of those seats." To which the conductor responded, "Go and take it with pleasure," or, as the plaintiff stated on cross-examination, "Take one with pleasure." Then, according to the plaintiff's testimony, he swung out to get into the other seat, but came into contact with the trolley pole, the car being then running, according to his estimate, at a rate of from 8 to 10 miles an hour. Although there was evidence in behalf of the defendant to the effect that the conductor shouted, "Look out for the pole," the plaintiff testified that the conductor said nothing more than has already been stated, and did not say anything about the trolley pole. The proof is that the distance between the so-called grab handles on the outside of the upright stanchions of the car and the trolley pole was 21 inches, according to the evidence in behalf of the plaintiff, and 22 inches according to the evidence in behalf of the defendant. The plaintiff made the further statement that, when he started to go out on the running board to change his seat, the conductor was looking at him. The case went to the jury solely on the question whether there was negligence on the part of the conductor in having, either in his words, or by his conduct, assented to the act of the plaintiff in leaving his place on the rear of the car to go in front, without giving some warning or intimation of the danger involved in such a movement. The learned trial judge expressly ruled that the railroad company had the right to construct its tracks and poles in the way in which they were constructed, and to run its cars in the manner in which they were run, and that the cars were in proper shape, the road was in proper shape, and the poles were in proper condition. The question presented by this appeal, therefore, is whether the conductor in charge of the car upon which the accident occurred was negligent either in giving the plaintiff a false assurance of safety or in failing to give him a proper warning.

In the case of a railroad company which is a common carrier of passengers it may be assumed that, where a danger arises which is unknown to the passenger, but which is known, or ought to be known to the agents of the carrier charged with the management of the train, a duty exists on the part of those agents to warn the passenger of the danger or to take some other means to guard him against it. The present case, however, involves the question whether any duty to warn exists where all the conditions which constitute the danger are as observable by the passenger

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himself and apparently as obvious to him as they are known to the agents or servants of the common carrier. In the simple assent of the conductor to the proposal of the plaintiff to change his seat I am unable to perceive any assurance on the part of the conductor that it would be safe for the passenger to do so without the exercise of due care on his part in executing the necessary movement. The construction of the car and of the railroad line and the position of the trolley poles and the size of his own body were just as patent to the plaintiff as they could have been to the conductor. It is true the plaintiff says he was sitting on the rear end looking at the American side and the scenery and did not notice the location of the trolley poles. We must also accept as true his statement that he had never been over the line before. These facts, however, could hardly have been known to the conductor. The learned counsel for the respondent insists that the conductor was chargeable with knowledge of the position of the poles, the construction of the car, the size of the plaintiff and the fact that the plaintiff was ignorant of the conditions surrounding him; but I can find nothing in the record which furnishes any basis for the assumption that the conductor knew that the plaintiff was not acquainted with these conditions. He certainly appears to have had the amplest opportunity to notice them. It was entirely possible by the exercise of care for the plaintiff to change his seat as he desired by proceeding along the running board on the other side of the car, or by waiting until the car was between two of the trolley poles, when he would incur no danger; and there appears to have been nothing in the expression of his intention to make the change which would necessarily indicate to the conductor that he proposed to attempt it at the precise time when he did. It seems to me quite clear that it would be going too far to hold the railway company responsible for the failure of a conductor to warn a passenger under the circumstances presented by this record. Although the duty to warn has frequently been asserted, I have been unable to find any case with a single exception hereafter to be noted which lays down so stringent a rule against a common carrier as would be established by the affirmance of this judgment. No doubt there is an implied duty on the part of a railroad corporation engaged in the transportation of passengers to employ a competent conductor. *Lambeth v. N. C. R. R. Co.*, 66 N. C. 494, 8 Am. Rep. 508. While a passenger may properly assume that a conductor knows whether he can under the particular circumstances get on or off or move upon the train with safety (*Filer v. New York Central R. R. Co.*, 59 N. Y. 351), yet where it is plainly open to his observation that reliance upon the judgment of those placed in charge of a train will expose him to risk that a reasonably prudent man will not assume, the passenger is not justified in assuming the risk (*Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144). The cases in which negligence has been imputed to a railroad company for the failure of those

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in charge of the train to give proper warning to the passengers have been cases in which the passengers were ignorant of the conditions which constituted the danger to which they were exposed. Thus a typical case is *Gonzales v. N. Y. & Harlem R. R. Co.*, 39 How. Prac. 407, where the plaintiff's intestate was killed on the defendant's railroad immediately after leaving the car of an accommodation train on which he was a passenger, being run down by an express train coming in the opposite direction upon a track on the west side of the train which he had just left; and this court held that it was the duty of the conductor and engineer to see that the passengers should be prevented from leaving the train on the west side, "or at least to give them notice of the approaching train and to request them either to sit still until that train had passed or to leave the train on the east side," and that the omission to do so constituted negligence.

None of the authorities cited in the brief for the respondent in support of the proposition that it was the duty of the conductor to warn the plaintiff seems to me to support his contention in that respect. I have carefully examined them all, and deem them readily distinguishable in principle from the case at bar. *Lent v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 467, 24 N. E. 653, was a case of assurance of safety to the passengers to proceed from one car to another, an invitation to do so, based on the fact that the conductor had called out "all aboard." In *Wilder v. Metropolitan St. Ry. Co.*, 10 App. Div. 364, 41 N. Y. Supp. 931, affirmed 161 N. Y. 665, 57 N. E. 1128, a passenger was thrown from her seat in one of the defendant's cars when it was passing over a sharp curve. The court said: "If warning to the passengers in the car was reasonably necessary for their protection or safety, it was the duty of the defendant to give them the benefit of it." I cannot see how this proposition, as applied to the circumstances of that case, has any bearing upon the question presented here. In *Clune v. Brooklyn Elevated R. R. Co.* (Sup.) 1 N. Y. Supp. 825, the plaintiff attempted to step from one car to another. Their platforms were in contact when the train was still, but pulled apart when the train was started, and the plaintiff fell into the opening. The General Term of the Second Department held that the conductor, if he heard the proposal of the plaintiff to cross, owed her the duty to warn her of the danger. This was on the assumption that the danger was unknown to the plaintiff. *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495, merely holds that an invitation to ride on the platform of a street car, and an assurance that it is a safe and suitable place, may be implied from the fact that the car and platform were full of passengers, without room for more, and that the conductor called for and received the fare from the plaintiff. These facts have no resemblance to those in the case at bar. In *Craven v. International Ry. Co.*, 100 App. Div. 157, 91 N. Y. Supp. 625, a passenger who had just alighted from a car for the purpose of making a transfer was struck and injured by another car. She had been invited or directed to make

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her transfer where she did. This was held by the Appellate Division of the Fourth Department to be "somewhat of an assurance that she would have an opportunity to make such transfer in safety." The only proposition in *Lucas v. Metropolitan St. Ry. Co.*, 56 App. Div. 405, 67 N. Y. Supp. 833, which relates in any manner to the duty to warn passengers is contained in these words in the opinion: "When it [defendant] was about to run its car around the curve at the speed set out in the record, it owed the plaintiff a duty of informing him of that fact, or indicating to him in some way that he must exercise at that point increased care for his own safety." *Gatens v. Metropolitan St. Ry. Co.*, 89 App. Div. 311, 85 N. Y. Sup. 967, merely emphasizes the duty to warn a passenger on a car platform of the danger to be apprehended in approaching an unknown curve in the road. The opinion in *Sheeron v. Coney Island & Brooklyn R. R. Co.*, 89 App. Div. 338, 85 N. Y. Supp. 958, does not indicate that any question whatever of assurance or warning was involved in that case. The same is true of *Lansing v. Coney Island & B. R. R. Co.*, 16 App. Div. 146, 45 N. Y. Supp. 120. In *Graham v. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. 917, where the plaintiff was injured while a passenger upon a platform of one of the defendant's cars, it was said by Martin, J.: "Even if the plaintiff assumed the ordinary risk which attended riding upon the platform, he had a right to assume that the defendant's servants would cause no unusual disturbance of the crowd, and that the cars were so constructed as not to render his position dangerous from their proximity to each other in passing over any portion of the road, or, at least if such danger existed, that he would be apprised of it." This decision simply asserts the obligation to warn against a danger unknown to the passenger. There was no question of failure to warn the passenger of danger in *Gray v. Metropolitan St. R. Co.*, 39 App. Div. 536, 57 N. Y. Supp. 587. Although he stood with but one foot on the platform, the plaintiff was deemed to be a passenger "by the express invitation or acquiescence of the defendant's employees" because the conductor had taken up his transfer ticket. In *Henderson v. Nassau Electric R. R. Co.*, 46 App. Div. 280, 61 N. Y. Supp. 690, the plaintiff, seeking passage in an open car of the defendant, which was crowded, was moving along the running board in search of a seat when he was struck by a van which the motorman had previously signaled to get out of the way, and which had stopped within about two feet of the track. It was held that the defendant was chargeable with notice that the distance was insufficient for persons upon the running board to escape contact with the van unless they observed it and bent their bodies inward toward the car. *Lehr v. Steinway & H. P. R. R. Co.*, 118 N. Y. 556, 23 N. E. 889, was a case in which the plaintiff, after procuring a seat for his wife in one of the defendant's cars, claimed that he had been compelled to ride on the step of the front platform by reason of the crowded condition of the car. He was thrown off by a movement

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of the passengers on the platform. It was held that the question of the defendant's negligence and the plaintiff's contributory negligence were properly submitted to the jury. The case of *Gleason v. Metropolitan St. R. Co.*, 99 App. Div. 209, 90 N. Y. Supp. 1025, turned on the exclusion of evidence tending to prove the existence of a custom to receive passengers at a particular place, and is not perceived to bear any possible relation to the questions involved here. The case of *Kohm v. Interborough Rapid Transit Co.*, 104 App. Div. 237, 93 N. Y. Supp. 671, related to an injury attributed to the overcrowding of one of the defendant's cars. No reference is made in the opinion to any liability predicated upon a failure to warn the injured passenger.

The single case which tends to uphold the position of the respondent is *West Chicago Street R. R. Co. v. Marks*, 182 Ill. 15, 55 N. E. 67. There it appeared that the defendant corporation operated open cars, along each side of which were running boards which, though designed as steps, were nevertheless often used by passengers to stand upon, sometimes when there was no room elsewhere in the car, and sometimes from choice. The plaintiff on boarding the car found all the seats occupied, as well as the aisles between the seats, and also the running board on the right-hand side of the car. He therefore, in company with other passengers, got upon the left-hand running board. While in this position the car passed a viaduct which was between 12 and 14 inches distant from the car. The plaintiff knew nothing about this structure, and was not warned of it by the defendant or any one else. There was no danger in riding on the footboard to one who knew of the existence and nearness of the viaduct, as it could have been avoided by standing close to the car. Upon these facts a judgment upon a verdict in favor of the plaintiff was affirmed by the Supreme Court of Illinois, which held that negligence could be imputed to the defendant corporation in running its cars so near to a fixed structure without warning the passengers who were in a position to sustain injury if not duly cautioned. The distinction between this Illinois case and the case at bar lies in the fact that the viaduct there in proximity to the railroad was no part of the railroad line, and was so close to the track that persons riding on the running board were obliged to take special care to avoid contact with it, while here the distance between the trolley poles and the car was shown by uncontradicted evidence to be great enough to enable persons ordinarily to stand upon or pass along the running board in safety, and the trial court expressly negatived the idea that any negligence could be predicated upon the manner in which the railroad was constructed and maintained. Indeed, there was no evidence that the construction of the railroad here was unusual, or that the distance between the running boards of the car and the trolley poles was such as was likely to endanger passengers making the ordinary and customary use of such running boards, or that the manner in which the road was built and maintained was in any respect such as to render the

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railroad company chargeable with negligence in the maintenance of the various structures making up the line as they existed at the time of the accident. This court said in *Craighead v. Brooklyn City R. R. Co.*, 123 N. Y. 391, 25 N. E. 387, where the defendant's cars passed one another at a distance of 17 inches: "The defendant was not bound to so construct its tracks that it would be impossible for a passenger to be struck by another car while he was standing on the outside of an open one."

I concede the correctness of the general proposition that if the company had created a danger it was its duty to warn its passengers against that danger, but under the charge of the trial judge and upon the theory on which the case was submitted to the jury the appellant had not created any danger in the proper sense of that term. Doubtless the presence of trolley poles is dangerous to any one riding on a car who may come in contact with them. So, also, there are dangers in the operation of every steam railroad, but these dangers are inherent in the operation of the roads and do not fall within the rule I have stated. If there was anything exceptional in the proximity to the track of the trolley poles or any other obstruction it would have been the duty of the conductor to warn the plaintiff of its existence, but I cannot see that it was his duty to warn the passenger of a danger which is merely an ordinary incident of such railroad travel. This is the crux of this case and the sole question that was submitted to the jury. Take the case of the trolley roads which run under the elevated railroads in the city of New York. It cannot be that it is the duty of the conductor to warn every passenger of the presence of the pillars of the elevated railroad, nor can he be expected for this purpose to distinguish between residents of the city accustomed to travel on the road and passengers who are strangers. In *Murphy v. Ninth Ave. R. R. Co.*, 6 Misc. Rep. 298, 26 N. Y. Supp. 783, affirmed 149 N. Y. 609, 44 N. E. 1126, the plaintiff while moving from the rear toward the front of the defendant's open car on the step which ran along the westerly side collided with an elevated railroad column and was thereby knocked off the car. The distance between the stanchion of the car and the nearest part of the column was fifteen inches. It appeared that he could have changed his position by proceeding along the easterly side of the car where there were no columns to interfere with his movements, and it was held that the injury to the plaintiff, if due to any negligence, was due to his own rather than that of the defendant.

I think this judgment should be reversed, and a new trial granted; costs to abide event.

MARABLE *v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 7, 1906.)

[55 S. E. Rep. 355.]

Carriers—Passengers—Nature of Relation.*—A carrier is not an insurer of the absolute safety of passengers, but its liability for injuries to a passenger is based on negligence.

Appeal—Admission of Evidence—Prejudice.—Where, in an action against a carrier for injuries to a passenger, there was no proof of negligence on the part of the carrier, the admission of an "Annual Clergyman's Reduced Permit," on which plaintiff traveled, providing that in consideration of the reduced rate granted by the permit, the owner assumed all risk of damage and accident to person or property while using the same, was harmless to plaintiff.

Trial—Special Instructions—Omission—Necessity of Request.—Omission of the court to charge on a particular subject is not error, where no request for a special instruction was made.

Carriers—Transportation of Passengers—Freight Trains—Assumed Risks.†—In taking passage on a freight train, a passenger assumes the usual risks incident to traveling on such trains when managed by prudent men in a careful manner.

Appeal from Superior Court, Iredell County; Ferguson, Judge.

Action by M. V. Marable against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an action brought to recover damages for injuries alleged to have been caused by the negligence of the defendant. The plaintiff was a passenger on one of defendant's local freight trains in September, 1904. The train was composed of about 35 cars and a caboose, in which the plaintiff was sitting on a seat with his feet on a box having tools in it, a stove being near and in front of him. There were cushioned seats in the car. He took passage at Charlotte for Landis and presented to the ticket agent an "Annual Clergyman's Reduced Permit" which contained the following contract: "In consideration of the reduced rate granted by this permit, the owner assumes all risk of damage and accident to person or property while using the same." The plaintiff testified that his name was on the permit, but that he had refused to sign it, though he used it for the purpose of securing a reduced

*See foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782; foot-notes appended to *Alton Light & Traction Co. v. Oliver* (Ill.), 20 R. R. R. 33, 43 Am. & Eng. R. Cas., N. S., 33; *Hayne v. Union St. Ry. Co.* (Mass.), 19 R. R. R. 66, 42 Am. & Eng. R. Cas., N. S., 66.

†For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers on freight trains, see foot-notes appended to *Rogers v. Choctaw, etc., R. Co.* (Ark.), 18 R. R. R. 592, 41 Am. & Eng. R. Cas., N. S., 592.

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rate, and was allowed the reduced rate by the agent. The plaintiff objected to the introduction of the permit, the objection was overruled and he excepted. The conductor took up his ticket after he got on the train. When between Concord and Glass the train came to a sudden and violent stop, throwing the plaintiff from his seat on the end of the bench against the stove and bruised and otherwise injured his right forearm. His nervous system was affected and his health failed. The engineer, not now in the service of the company, testified that there were 35 cars in the train which were fully equipped with automatic air brakes and all necessary appliances. Everything was in first-class condition. When the train was approaching Glass, he got an order to stop there and did stop the train in the usual manner. The train was on an upgrade all the way to Glass from Concord and there could have been no unusual jar or jolt of the train when it stopped. There was a jar and always is when such a train is stopped. It comes from the slack in the cars. There is more jolting in a freight than in a passenger train. The train was running from 6 to 8 miles an hour. There was evidence tending to show that the plaintiff occupied a dangerous position and one likely to cause his fall from the seat if the train should make the usual stop and that a person not used to riding on a freight train of 35 cars is very apt to get a good bump if he is not careful, and that almost any one will be jolted some. There was much other evidence substantially to the same effect as that already stated.

The court, at the request of the plaintiff, charged the jury that a carrier cannot stipulate for exemption from liability for negligence, and the permit held by the plaintiff and used by him to get a reduced rate of fare would not exonerate the defendant if the plaintiff was injured by its negligence, and that it is no bar to his recovery, that where one is injured in a public conveyance and the injury resulted from something over which the carrier had control, the law raises a presumption of negligence which extends to the occurrence, regardless of the party who is injured; that, if the jury found that the plaintiff was injured as described by him, the law raised a presumption of negligence and he is entitled to recover, unless the defendant has shown by the greater weight of the evidence that the sudden and violent stoppage of the train was caused by something not within its control, and, unless this has been shown by the defendant, they will answer the first issue (as to defendant's negligence) "Yes"; that in such a case and under such facts and circumstances the doctrine of *res ipsa loquitur* applies and casts the burden on defendant to show that the injury was unavoidable, and, if it has failed so to do, they will answer the first issue "Yes." These were all the instructions requested by the plaintiff on the first issue, and all were given. The court, at defendant's request, charged the jury that the common law made the defendant an insurer of the plaintiff's safety, and that the permit had the effect of relieving the de-

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defendant of the said common-law liability, and that defendant would only be liable for negligence if there was any; that negligence must be shown to have caused the injury which must have proceeded from some fault of the defendant; that the plaintiff assumed the ordinary risks incident to the running of a freight train, such as the one in question was, if it was managed in a prudent and careful manner, and the jerking of the train which is alleged to have caused the injury was unavoidable and such as ordinarily occurs in the operation of a freight train, and, if the train was so managed and the jolting or jarring which caused the injury was unavoidable and only incidental to the running of such trains, even when prudently and carefully managed, they should answer the first issue "No." The court in its general charge, which was elaborate, explained to the jury the contention of the parties and the bearing of the testimony upon the issues in the case, and then substantially instructed the jury that, while the burden of the issue is upon the plaintiff and he must show negligence, yet, if there was such a sudden and violent stopping of the train that plaintiff was thrown from his seat, it would require explanation from the defendant, and the inquiry naturally arises, why was the train so suddenly stopped? The answer should naturally come from the defendant, as the plaintiff was in the caboose and the defendant's servants were in charge of the train.

The jury answered the first issue, as to defendant's negligence, "No." Judgment was entered for the defendant, and the plaintiff appealed.

G. B. Nicholson, Furches & Coble, and J. B. Connelly, for appellant.

L. C. Caldwell, for appellee.

WALKER, J. (after stating the case). We can find no fault with the instructions given by the court to the jury when they are considered together and construed in the light of the facts which the evidence tended to establish. The judge gave the plaintiff the full benefit of the circumstances attending the injury as evidence of negligence, and charged the jury that the defendant must show that the jolting of the train was unavoidable in order to acquit itself of negligence. A carrier of passengers is not an insurer, as is a carrier of goods. He is, therefore, not absolutely liable for the safety of the passenger as the carrier of goods is for the safety of the goods intrusted to his care. His liability is based on negligence, and not on a warranty of the passenger's freedom from all the accidents and vicissitudes of the journey. The doctrine that the carrier of goods is an insurer was adopted for reasons peculiar to the undertaking and because of the unlimited control of the carrier over the property. It was first announced, we believe, by Lord Holt in the famous case of *Coggs v. Bernard*, 2 Ld. Raymond, 909 (1 Smith's L. C. 369), in these

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words: "The law charges the person thus intrusted, to carry goods as against all events but the act of God and the enemies of the King," and this dictum of his was formally accepted as a principle of the common law by solemn decision in *Forward v. Pittard*, 1 Term Rep. 29, and *Christie v. Griggs*, 2 Camp. 79. In the latter case Lord Mansfield drew the distinction between the two classes of carriers when he tersely said: "There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant the safety of passengers." The distinction was recognized in *Aston v. Heaven*, 2 Esp. 532, *Crofts v. Waterhouse*, 3 Bing. 319, and *Harris v. Costar*, 1 Car. & P. 636, and finally settled in the leading cases of *Readhead v. Railway*, L. R. 4 Q. B. 379, and *Bridgers v. Railway*, L. R. 7 H. L. 231. In this country the measure of liability of the two kinds of carriers has been practically settled according to the English rule. *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 10 L. Ed. 115; *Railroad v. Ball*, 53 N. J. Law, 283, 21 Atl. 1052; *Palmer v. Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629; *Gilbert v. Railway*, 160 Mass. 403, 36 N. E. 60; *Meier v. Railroad*, 64 Pa. 225, 3 Am. Rep. 581. This court has recognized the distinction, and erected different standards of duty for the two classes in *Hollingsworth v. Skelding* (at this term) 55 S. E. 212, *McNeil v. Railroad*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227 (s. c. 132 N. C. 510, 44 S. E. 34, 67 L. R. A. 227, 95 Am. St. Rep. 641), and *Everett v. Railroad*, 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985. A carrier of goods can only relieve himself of his common-law liability as an insurer for loss or damage not resulting from his negligence by a contract reasonable in its terms and founded upon a valuable consideration (*Everett v. Railroad*, *supra*), but this principle does not apply to the carrier of passengers, because he is under no such liability. 1 Fetter on Carriers, § 2; 6 Cyc. 590-594. In this view of the law, the evidence as to the permit was harmless.

The exceptions of the defendant are so placed in the charge that we are at a loss to know the particular proposition of law as laid down by the court which was considered objectionable. If it was supposed that the defendant was bound to exercise the highest degree of care and that the court failed to raise the degree to the required maximum, it is sufficient to say that there was no request for such a special instruction and the omission, if there was one, is not, therefore, available to the defendant. The many different forms of expression used in stating the rule of liability all recognize substantially the same test, the difference in statement being for the purpose of applying the rule to different states of facts. Thus it has been said that the carrier is required to exercise that high degree of care for the safety of the passenger which a prudent person would use in view of the nature and risks of the business, or, in general, the highest degree of care, prudence, and foresight to prevent injury to the passenger,

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which the situation and circumstances demand in view of the character and mode of conveyance, and which a prudent man engaged in the business, as usually conducted, would employ, and which is reasonably practicable and consistent with the efficient conduct of the particular business and the free use of all proper means and appliances. The standard of duty should be according to the consequences that may ensue from carelessness. 6 Cyc. 591-593; *Railroad v. Horst*, 93 U. S. 291, 23 L. Ed. 898. Whatever the rule may be, the plaintiff has no right to complain of its misapplication in this case, as the court gave all of the instructions he asked for, and, besides, the presiding judge finally brought the liability of the defendant to the true test, which is negligence, or the failure to exercise proper care, under the circumstances, and he told the jury that the defendant would be liable unless the injury was unavoidable. In taking passage on a freight train, the plaintiff assumed the usual risks incident to traveling on such trains, when managed by prudent and competent men in a careful manner. While life and limb are as valuable and the right to safety may, perhaps, be the same in the caboose as in the palace car, yet it must be remembered that, in the operation of freight trains, the primary object is the transportation of freight, and the means and appliances used are, and are known by the passenger to be, adapted to that special business, and, therefore, one who travels on such trains must expect that jolts and jars will occur, and he necessarily takes the risk of those which are not caused by the negligence of the carrier's servants, but which are usual and consequent on such mode of transportation. 1 Fetter on Carriers, § 17; *Railroad v. Horst*, 93 U. S. 291, 23 L. Ed. 898. It seems to us that the charge of the court covered the entire case, and, when properly construed, submitted it fairly and correctly to the jury under all the circumstances, and when this is done the parties have no just ground of complaint, or for asking anything more, especially if they have failed to request more definite instructions. The charge appears to be in accordance with the law as stated by this court in *Wallace v. Railroad*, 98 N. C. 494, 4 S. E. 503; 2 Am. St. Rep. 346, s. c. 101 N. C. 454, 8 S. E. 166, *Smith v. Railroad*, 99 N. C. 241, 5 S. E. 896; and his honor, perhaps, was guided by those cases.

The defendant moved in this court to dismiss the appeal under rule 20 for failure to comply with the requirements of rule 19 (53 S. E. vii). A similar motion was made at this term, based upon substantially the same grounds, in *Davis v. Wall*, 55 S. E. —, and we enforced the rules to the extent of dismissing the appeal in that case. We again specially direct the attention of the profession to those rules and to that decision as being very proper for their careful consideration when preparing cases on appeal. We have discussed this case at some length because the principles involved are of vital importance, and, as the practical result will be the same, we prefer to decide it on the merits instead of dismissing the appeal.

No error.

CARLETON v. YADKIN R. Co. et al.

(Supreme Court of North Carolina, Nov. 13, 1906.)

[55 S. E. Rep. 429.]

Carriers—Injury to Passenger—Liability of Lessor of Railroad for Injury by Lessee.*—A railroad company, which has leased its track and rolling stock to another corporation, is liable for injury to a passenger caused by the negligence of the lessee's servants.

Same—Joinder of Defendants.—Railroad companies jointly operating their roads through the agency of a lessee may be joined in one action for negligent injuries to a passenger being carried over their lines, where the negligent acts were continuous and chargeable to the common agent of the lessee.

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by P. S. Carleton, as administrator, against the Yadkin Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought for the purpose of recovering damages by reason of the death of plaintiff's intestate alleged to have been caused by the negligence of defendants. The plaintiff alleged: That the defendants, the Yadkin Railroad Company and North Carolina Railroad Company, are separate and distinct corporations, and, as such, are engaged in the business of common carriers of passengers and freight. The defendant Yadkin Railroad Company owns a line of railroad extending from Salisbury, N. C., to Norwood, N. C., and the defendant North Carolina Railroad Company owns the line of railroad extending from Greensboro, N. C., via Salisbury, to Charlotte, N. C. That prior to and at the time of the negligence complained of, both of said defendants had leased their aforesaid line of railroad to the Southern Railroad Company, a corporation existing under and by virtue of the laws of the state of Virginia, and by virtue of said lease the said lessee company, by permission and consent of defendants, had control and possession of the aforesaid lines of railroad, and was running its trains and cars thereover in charge of its servants, agents, and employees. That both defendants operate jointly the lines of said railroad from the Salisbury depot to the Salisbury cotton mills, which is a part of the North Carolina Railroad right of way. That on August 22, 1905, plaintiff's intestate purchased of said lessee company's agent at Norwood a ticket from that

*For the authorities in this series on the subject of the liability of a lessor railroad for injuries sustained while its road is operated by the lessee, see foot-notes appended to *Franklin v. Atlanta, etc., Ry. Co.* (S. Car.), 20 R. R. R. 563, 43 Am. & Eng. R. Cas., N. S., 563; foot-notes appended to *Hamilton v. Louisiana & N. W. R. Co.* (La.), 20 R. R. R. 506, 43 Am. & Eng. R. Cas., N. S., 506; foot-notes appended to *Shores v. Southern Ry. Co.* (S. Car.), 20 R. R. R. 88, 43 Am. & Eng. R. Cas., N. S., 88.

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point to his home, and became a passenger on said line of railroad belonging to the said defendant Yadkin Railroad Company. That after becoming said passenger, and taking a seat in one of the passenger cars on said line, said intestate became suddenly ill and unconscious, and that shortly thereafter the conductor on said train aroused said intestate, and obtained his ticket. Said conductor then saw and realized that said intestate was dangerously ill, but negligently and carelessly passed him by without providing him with any comforts, restoratives, medicines, or physician, and negligently and carelessly failed to notify any physician of the serious condition of said intestate, although six towns were passed through in which physicians resided, and which could have been easily procured, if the conductor on said train had performed his duty to said intestate. That said lessee negligently and carelessly failed to remove said intestate from said train after he became ill and unconscious, but negligently brought him on to Salisbury; said train arriving at 7:15 o'clock p. m. That aforesaid lessee, through its servants and agents, failed to remove said intestate from said car, or to provide him with any physician, etc., but negligently placed said car upon one side of its track, with said intestate as the only passenger or person therein, and negligently left said intestate in said car on said side track until 10 o'clock next morning without attention, etc. That about 12 o'clock said intestate died.

The defendant Yadkin Railroad Company demurred to the complaint, and assigned as ground of demurrer: "(1) The plaintiff has joined two separate and distinct causes of action arising out of an alleged tort against two separate and distinct defendants: First, an alleged cause of action against the North Carolina Railroad Company for alleged acts of negligence by the employees of the Southern Railway Company, while the Southern Railway Company was alleged to be operating a train over the railroad tracks of the North Carolina Railroad Company, and while said train was not on any railroad tracks of this defendant, with an alleged cause of action against this defendant, for the alleged negligence of the employees of the Southern Railway Company, while operating a train over the railroad of this defendant, and before the said train reached the railroad of the North Carolina Railroad Company; second, that as to this defendant, complaint does not state facts constituting a cause of action as to those matters alleged to have occurred after the said train left the said road of this defendant, and said cause of action for such alleged negligent acts is solely against the North Carolina Railroad Company, and said cause of action has been improperly joined with an alleged cause of action against this defendant for matters alleged to have occurred on the road and track of this defendant, over which it is not alleged that the North Carolina Railroad Company had any control. (2) It does not appear from the said complaint, and it is not alleged, that the alleged acts of negligence

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alleged to have occurred upon the road of this defendant, caused the death of the plaintiff's intestate. (3) It does not appear from the said complaint that any acts done or failed to be done while the said train was on the track or road of this defendant caused the death of the plaintiff's intestate."

The defendant North Carolina Railroad Company demurred for the same causes set forth in the demurrer of its codefendant. The cause coming on for hearing, the court overruled both demurrers. Defendants were allowed to file answer. Defendants excepted, and appealed.

T. C. Linn, for appellant.

R. Lee Wright, for appellee.

CONNOR, J. (after stating the facts). That a railroad company which has leased its roadbed, track, and rolling stock to another corporation is liable for the torts of the lessee has been so frequently decided by this and other courts that it cannot now be considered open to discussion. *Aycock v. Railroad*, 89 N. C. 321; *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959; *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Norton v. Railroad*, 122 N. C. 910, 29 S. E. 886; *Pierce v. Railroad*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316. That this liability extends to an injury sustained by a passenger by the negligence of the servants of the lessee is decided in *Tillett's Case*, *supra*. In *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, it was shown that a number of railroad companies formed an association under the name of the "Atlantic Coast Dispatch"; that bills of lading were issued in the name of, and by, the said association, by which it undertook to carry freight from Lowell, Mass., to Rocky Mount, N. C. For negligent delay in carrying such freight the consignee sued two road members of the association. Faircloth, C. J., said: "Upon examination and reflection, we are of the opinion that the defendants and their connecting lines are jointly liable, each for the others, on the contract before us; * * * that is to say, that they are engaged in business as partners under the name of the 'Atlantic Coast Dispatch.' They are still common carriers; none the less so because they have certain stipulations. Having jointly agreed to conduct the 'All Rail Fast Freight Line' under the name above stated, * * * and having so informed the public, and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business." The demurrer and argument made to sustain it fails to note the allegation "that both defendants operate jointly the line of said railroad from the Salisbury depot to the Salisbury cotton mills, and which is a part of the North Carolina Railroad right of way," and the further allegation that the plaintiff's intestate purchased a ticket of the agent of the lessee of said roads from Norwood to Salisbury. The conductor was the employee of the lessee, and the agents and servants whose negligence is complained of were in the employment of the lessee. The

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case presented by the complaint comes to this: Two railroad corporations jointly operating their properties through the agency of a lessee between two points, connected by their roadbeds and tracks, in the discharge of their duty as common carriers, undertake to carry plaintiff's intestate over their tracks from Norwood to Salisbury. Why should they not be jointly liable for a failure to discharge the duty undertaken in a joint operation and use of their property in the exercise of their franchise? To hold otherwise would violate elementary principles of law, and practically deny to the passenger any remedy. It may be that he could, if so advised, sue each road separately, but as in a case like the one disclosed by the complaint, where the negligent acts were continuous, and chargeable to the common agent of the defendant's lessee, who for the purpose of this case must be considered as the defendants themselves, we can see no reason why he may not join them in one action. The underlying principle upon which the decision is based in the liability of the lessor for the acts of its lessee; this being based upon the principle that a railroad company cannot divest itself of its duty to the public or its consequent liability by leasing its track, or in any other manner permitting its track to be used by some other corporation. For the purpose of this appeal the relation of the two roads must be construed as a joint undertaking in the discharge of their duty to the public as common carriers, using the lessee as their common agent for that purpose. In this point of view it is immaterial whether we treat the cause of action as for a breach of contractual duty or a tort arising out of a breach of contract. The cause was argued before us principally upon a demurrer for misjoinder, and we think it best to refrain from entering into any discussion of the merits of the case as disclosed by the complaint. The principles applicable to the case after the facts shall have been developed on the trial are well settled.

The judgment, overruling the demurrer and directing the defendants to answer over, must be affirmed.

Affirmed.

CHICAGO, R. I. & P. RY. CO. *v.* STIBBS.

(Supreme Court of Oklahoma, Sept. 5, 1906.)

[87 Pac. Rep. 293.]

Evidence—Conclusion of Witnesses.*—It is not error for the court to strike from a deposition, or exclude from the testimony of a witness, any statement or answer which is merely a supposed inference or conclusion of the witness drawn from a given state of facts.

Carriers—Injuries to Passengers—Diligence.—A common carrier of persons for hire or reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.

Damages—Personal Injuries.—In an action for personal injuries which prevent the plaintiff from pursuing his usual occupation, his loss of earnings is a proper element of damages, and evidence of his average monthly earnings is admissible.

Trial—Instructions.—The instructions in this case with reference to the measure of damages do not assume the existence and proof of disputed facts, and thereby invade the province of the jury in determining the measure of damages, but fairly and correctly state the law.

(Syllabus by the Court.)

Error from District Court, Grant county; before Justice James K. Beauchamp.

Action by John Stibbs against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action for personal injuries brought in the district court of Grant county, by John Stibbs, defendant in error, against the Chicago, Rock Island & Pacific Railway Company, plaintiff in error. The facts, briefly stated, are that the plaintiff was a lawful passenger on the defendant's train, having purchased at Kansas City a ticket to Medford, Okl. That about the hour of three o'clock on the morning of March 14, 1903, at a point near Dwight, Kan., the train collided with the east-bound train known as the "Golden State Limited." The plaintiff at the time was asleep in one of the coaches of the west-bound train, and was thrown from the seat in which he was reclining at the time, against the furniture or seat of the car, whereby he claims he sustained serious injuries to his head and back, and that said injuries were occasioned by reason of the negligence of the defendant company. The defense was a general denial, and contributory

*See foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782; foot-notes appended to *Alton Light & Traction Co. v. Oliver* (Ill.), 20 R. R. R. 33, 43 Am. & Eng. R. Cas., N. S., 33.

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negligence. There was little, if any, conflict in the evidence, except on the issue the injuries that were sustained by the plaintiff. The injuries sustained by the plaintiff were the principal ground of contention. The plaintiff claimed that he received serious injuries to his head and spine, on account of which he was wholly incapacitated to pursue his usual vocation. On the other hand, the railway company contended that the plaintiff received but slight injuries, if any, and that the injuries the plaintiff claimed to have sustained to his spine were merely feigned and a sham. A great deal of evidence was introduced on both sides, and the jury returned a verdict for the plaintiff, and assessed his damages at \$6,500. At the request of the defendant, special findings of fact were submitted, which were answered by the jury, and returned with their general verdict. These answers are in harmony with the general verdict. Judgment having been entered by the court in accordance with the verdict, a motion for new trial was filed, and was considered and overruled by the court, and exception was saved, and the defendant brings the case here for review.

M. A. Low, Paul E. Walker, Blake & Low, and J. C. Robberts, for plaintiff in error.

P. C. Simons and A. M. Mackey, for defendant in error.

HAINER, J. (after stating the facts). The first error assigned and argued is that the court erred in striking out certain portions of the affidavit of Paul E. Walker for continuance, and which was treated as the deposition of the absent witness, Bert Streets, under the provisions of section 329 of our Code of Civil Procedure (page 816, Statutes of 1893). The portions stricken out were merely the opinion or conclusion of the witness, and not a statement of fact. It is not error for the court to strike from a deposition, or exclude from the evidence of a witness, any statement or answer which is merely an inference or conclusion of the witness drawn from a given state of facts. In *Da Lee v. Blackburn*, 11 Kan. 190, the rule is thus stated: "It is not error for the court to exclude statements of a witness when the statements are not statements of fact or conversation, but merely conclusions of the witness drawn from facts and conversations." In *Shepard v. Pratt*, 16 Kan. 209, it is said: "A witness should state the facts, and not his conclusions from the facts. So, where, in a deposition, a witness, after testifying that he heard a conversation between certain parties, proceeds as follows: 'From such conversation I learned,' and then gives, not his recollection of what the parties stated, but what he understood was the result of the conversation, held, there was no error in ruling out that portion of the deposition."

Plaintiff in error contends that the court erred in giving instruction 5, which is as follows: "You are instructed that, under the law of this territory, a carrier of persons for reward must use the utmost care and diligence for their safe carriage, must

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provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." It is sufficient answer to this contention to say that this instruction was in the language of our statute, which provides the degree of care which a common carrier for hire must exercise. Section 440, p. 145, Statutes of 1893, provides as follows: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." But it is contended by the learned counsel for plaintiff in error that this provision of our statute is not applicable, since the collision of the defendant's trains occurred in Kansas, and the carriage of the plaintiff was in the nature of interstate commerce, and was not under state control. This contention is not well taken. Independently of any statutory provision, the instruction correctly states the law, upon principle as well as sound public policy. In *Philadelphia & Reading Railroad Company v. Derby*, 14 How. 468-485, 14 L. Ed. 502, the Supreme Court of the United States, in discussing this proposition, uses the following language: "When carriers undertake to convey persons by the powerful but dangerous agency of stream, public policy and safety require that they be held to the greatest possible care and diligence. And, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" In this case the Supreme Court of the United States had under consideration a free passenger, a stockholder of the company, taken over the road by the president to examine its condition, and it was contended in the argument that as to him nothing but gross negligence would make the company liable. In the subsequent case of *Steamboat New Word v. King*, 16 How. 469, 14 L. Ed. 1019, which was also a case of a free passenger carried on a steamboat and injured by the explosion of a boiler, Curtis, J., quoting the above paragraph said: "We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law." In *Indianapolis & St. Louis Railroad Company v. Horst*, 93 U. S. 291, 23 L. Ed. 898, the Supreme Court of the United States held that, in an action against a railroad company for injuries received by a passenger upon its road, it is not error for the court to instruct the jury "that a person taking a cattle train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes." Mr. Justice Swayne, in the course of the opinion, on page 296, after reviewing the above authorities, uses the following language: "But, upon principle, why should not the law be so in this case? Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is

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uniformly applied to passenger trains. The same considerations apply to freight trains. The same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, but sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains air-brakes, bell pulls, and a brakeman upon every car, but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed. The language used cannot mislead. It well expresses the rigorous requirement of the law, and ought not to be departed from. The rule is beneficial to both parties. It tends to give protection to the traveler, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen. *Dunn v. Grand Trunk R. R. Co.*, 58 Me. 187, 4 Am. Rep. 267; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Pittsburg & C. R. R. Co. v. Thompson*, 56 Ill. 138." If the principle announced by these well-considered cases applies to a free passenger on a stock train, it must follow, as an irresistible conclusion, that it applies with much greater force to a passenger train and to a passenger who pays his fare, and who is free from any fault or negligence, as in the case under consideration. On the other hand, the evidence shows that the collision in this case between the defendant's passenger trains was wholly due to the negligence of its servants and employees. It follows that there was no error in giving this instruction to the jury.

The next error complained of is that the court erred in its charged to the jury in reference to the measure of damages recoverable in this case. Instruction 6, which was given at the request of the plaintiff, is as follows: "If you find from the evidence, under the rules laid down in these instructions, that the

plaintiff is entitled to recover damages from the defendant, then you are instructed that, in estimating the damages which you will award the plaintiff, you are entitled to take into consideration the extent of plaintiff's injuries, if any were suffered by him, the physical and mental pain and suffering which he has endured, and which were the natural and proximate result of such injuries, and also that pain and suffering which is reasonably certain that he will suffer in the future as the natural and proximate result of such injuries. You may also consider his loss of capacity, physical and mental, to attend to his usual business or perform the kind of labor for which he is fitted. You may also consider his loss of time from his business or occupation and that which is reasonably certain to result in the future as the natural, direct, and proximate result of his injuries. You may also take into consideration the necessary medical and other expenses incurred by him in endeavoring to effect a cure or alleviate his condition. To recover for such expenses the plaintiff must show either that he had paid for such services or become liable to pay for the same. He may also recover for such future expenses for medical and other expenses as it is reasonably certain that he will be compelled to incur for such treatment and care as are regarded necessary and imperative in his behalf as the direct and proximate result of the injuries from which he is suffering." It is earnestly contended by counsel for plaintiff in error that this instruction is erroneous, and ground for reversal of the cause, for the reason that, in stating the elements of damage, the court assumed the existence of injuries which were not warranted by the evidence. The general doctrine is well settled that a charge which, in effect, assumes the existence and proof of disputed facts, or which restricts or interferes with the discretion of the jury is erroneous, and, if it is of such a character as to mislead the jury, it is ground for reversal of the cause. But, after a careful analysis of the instruction, we do not think that it is subject to these objections. On the contrary, we think when the instruction is carefully considered, it fairly and correctly states the various elements of damages recoverable, if the jury find the issues in favor of the plaintiff. It will be observed that the instruction stated at the very outset, "if you find from the evidence under the rules laid down in these instructions that the plaintiff is entitled to recover damages from the defendant, then you are instructed that, in estimating the damages which you will award the plaintiff, you are entitled to take into consideration the extent of plaintiff's injuries, *if any were suffered by him.*" (The italics are ours.) Then follows a statement of the different elements of damages that are recoverable in an action of this kind. And it seems to us that it was not necessary to repeat the phrases, "if you find from the evidence," and, "if any were suffered by him," in stating the subsequent elements of damages referred to in the same instruction; and that these various elements necessarily related back to, and were qualified by, the first part of the

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instruction, which stated under what circumstances the plaintiff could recover.

Nor do we think instruction 7, in reference to the measure of damages recoverable for physical and mental pain and suffering, is subject to serious objection or criticism. While some of the language used in the instruction was perhaps not as felicitous as it should have been, yet we are of the opinion that the instruction did not confuse or mislead the jury, and that this instruction, when considered with the other instructions in reference to the measure of damages, fairly stated the law, and that the charge, as a whole, is in accord with the adjudicated cases. In *Railroad Company v. Barron*, 72 U. S. 105, 18 L. Ed. 591, Mr. Justice Nelson, speaking for the court, said: "The damages in these cases, whether the suit is in the name of the injured party, or, in case of his death, under the statute, by the legal representative, must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. If the suit is brought by the party, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." In the case of the "*City of Panama*," 101 U. S. 453, 25 L. Ed. 1061, this doctrine was reiterated and approved by the court. In *Vicksburg, etc., Railroad Co. v. Putman*, 118 U. S. 554, 7 Sup. Ct. 1, 30 L. Ed. 257, Mr. Justice Gray, speaking for the court says: "In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including, not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he could otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant. *Wade v. Leroy*, 20 How. 34, 15 L. Ed. 813; *Nebraska City v. Campbell*, 2 Black (U. S.) 590, 17 L. Ed. 271; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *New Jersey Express Co. v. Nichols*, 32 N. J. Law, 166, 33 N. J. Law, 434, 97 Am. Dec. 722; *Phillips v. London & Southwestern Railway*, 4 Q. B. D. 406, 5 Q. B. D. 78, 5 C. P. D. 280; S. C., 49 Law Journal (Q. B.) 233." In *Davidson v. Southern Pac. Co.* (C. C.) 44 Fed. 481, the following charge was approved: "In reference to the question of damages, you are instructed that that law furnishes no fixed or defined standard for the guidance of the jury in awarding compensation in cases of this kind for the injuries sustained by the injured party, and the amount of damages to be awarded must be left, in view of the testimony, to the sense of right and justice of the jury. The plaintiff, if your finding be in his favor, should be fairly and justly compensated for the injuries he has sustained. In making your estimate of such damages, you are authorized to consider:

- (1) Such special expenses as may be shown by the testimony

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to have been incurred by the plaintiff by reason of his injuries during the period of his disability, while confined; (2) the value of the time lost by him during the period in which he was disabled, from his injuries, to work and labor, taking into consideration the nature of his business, and the value of his services in conducting the same; (3) fair compensation for the mental and physical suffering caused by the injury; and (4) the probable effect of the injury in future upon his health, and the use of his injured hand, and his ability to labor and attend to his affairs, and, generally, any reduction of his power and capacity to labor and earn money, and pursue the course of life which he might otherwise have done." Measured by the rule laid down in these authorities, we are of the opinion that there was no material error in the charge to the jury which would justify a reversal of the cause.

It is next contended that the court erred in admitting the testimony of the plaintiff in regard to the damages that were recoverable for loss of time. It seems that after the plaintiff had testified that his occupation was that of a farmer, a stock raiser, and a well driller, he was permitted to state what his earning capacity was reasonably worth per month prior to the time he sustained the injuries which were the subject of this controversy. To this ruling the defendant excepted. We are of the opinion that the evidence was admissible; and hence that there was no error in this ruling. In *Murdock v. New York & B. Dispatch Ex. Co.* (Mass.) 46 N. E. 57, the Supreme Judicial Court of Massachusetts held that, "in an action for personal injuries which prevented plaintiff from working, his loss of earnings is a proper element of damages, and evidence of his average monthly earnings is admissible." In *Braithwaite v. Hall*, 168 Mass. 39, 46 N. E. 398, this rule is clearly stated by Mr. Justice Holmes, then Associate Justice of the Supreme Judicial Court of Massachusetts, and now one of the Justices of the Supreme Court of the United States, as follows: "The ruling as to damages was correct. It is true, that, when a man is allowed to prove his average earnings or the wages actually lost by him, they are proved as a measure of the value of the time and power to labor of which he has been deprived, not as themselves recoverable *eo nomine*. But the distinction does not appear to be material in this case. There is nothing to show that the wages were not reasonable, and a proper measure of the value of the plaintiff's time. It is argued for the defendant that the true measure is the market value of the averages of a man of the plaintiff's average capacity, working in the same employment. But the cases cited do not sustain the position, and there are many decisions adopting the test of the individual's experience. If any distinctions in the value of men's time are admitted, there is no reason why the whole actual difference should not be recognized." In *Wade v. Leroy*, 61 U. S. 34, 15 L. Ed. 813, "in an action against the owners of a ferryboat, for personal injuries sustained by the negligence of its offi-

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cers, it was held that the plaintiff might show that he was engaged in a particular business, and had been incapacitated from attending to it as exhibiting the extent of the injury, and that it had occasioned expense, suffering and loss of time which had value to him, although the nature of his occupation was not set forth in the declaration." And in *Nebraska City v. Campbell*, 67 U. S. 590, 17 L. Ed. 271, it was held that, in an action for damages sustained by the negligence of a municipal corporation, evidence showing the business in which the plaintiff was engaged, its extent, and the consequent loss arising to him from his inability to prosecute it, is relevant and pertinent, as enabling the jury to fix, with some certainty, the direct and necessary damages resulting from his injuries. So, in the case under consideration, we think it was proper for the plaintiff to state that his time, prior to the accident, was reasonably worth from \$100 to \$150 a month. And, in the light of all the evidence, we are of the opinion that the amount allowed for loss of time and diminution of earning capacity was not excessive.

Upon a careful examination and consideration of the entire record, we are of the opinion that no error was committed which would require a reversal of this cause, and, believing that the verdict of the jury is fully sustained by the evidence, and that the judgment of the court is in consonance with right and justice, the cause is hereby affirmed. All the Justices concurring.

PATTERSON v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, Nov. 20, 1906.)

[97 S. W. Rep. 426.]

Damages—Breach of Contract—Carriers—Delay in Transportation—Notice of Special Circumstances.*—Where one shipped meal to himself, intending to feed it to his cattle at the point of destination, and after a delay in delivery gave the carrier notice of the purpose for which the meal was consigned, that his supply of feed was almost exhausted, that he could not supply himself elsewhere, and that the cattle could not be changed to other feed without loss, of which the carrier did not have notice at the time of the shipment, he was not entitled to recover special damages for loss in the weight of the

*For the authorities in this series on the subject of the right to recover special damages from a carrier of freight for loss or injuries from delay, see foot-notes appended to *Wehman v. Southern Ry.* (S. Car.), 20 R. R. R. 721, 43 Am. & Eng. R. Cas., N. S., 721; *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 20 R. R. R. 727, 43 Am. & Eng. R. Cas., N. S., 727; *Carpenter v. Baltimore & O. R. Co.* (Del. Sup'r Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679; foot-notes appended to *Southern Ry. Co. v. Webb* (Ala.), 20 R. R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26.

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cattle, extra work in attempting to care for them, and secure proper feed, arising from further delay in delivery, after the lapse of a reasonable time from the giving of the notice.

Appeal from Circuit Court, Larue County.
 "To be officially reported."

Action by C. L. Patterson against the Illinois Central Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Otis M. Mather, Charles Creal, and Sam Y. Jones, for appellant.

Williams & Handley, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

HOBSON, C. J. Appellant Patterson, on November 1, 1904, caused to be delivered to the Illinois Central Railroad Company at Helena, Ark., a car load of cotton seed meal and hulls consigned to him at Hodgenville, Ky. The car load was not delivered at Hodgenville until the 24th of November, and he filed his suit to recover damages. He alleged in his petition that a reasonable time for the delivery was not more than 6 days, or not later than November 7th; that on or about November 4th, and at divers other times before the car load of provender was finally delivered, he called at the depot of the defendant at Hodgenville to receive it, and, learning that it had not arrived, he notified the defendant that the car load of cotton seed meal and hulls was to be used by him in feeding a large number of cattle which he then had on hand and was feeding on cotton seed meal and hulls; that his supply of such feed was almost exhausted; that he could not supply himself elsewhere and his cattle could not be changed to other feed without great loss and he would be greatly damaged by further delay in the delivery of the feed; that the defendant upon receiving this notice undertook to trace the car load of feed and have it delivered to him in a reasonable time thereafter; that a reasonable time after the notice was given was not more than 6 days, and the freight should have been traced and delivered not later than November 13th, but that by gross negligence in tracing and delivering the car it was not delivered until 11 days later, whereby he was deprived of the proper feed for his cattle for a period of 11 days; that thereby he sustained great loss in the weight of his cattle and in extra work and labor in attempting to care for them and secure proper feed for them during this time, amounting in all to the sum of \$220, for which he prayed judgment. The circuit court sustained a demurrer to his petition, and he appeals.

The general rule is that, where a contract has been broken, the damages which may be recovered for the breach are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. It will be observed that the damages which

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the plaintiff sought to recover are wholly special damages, growing out of the fact that he was feeding a lot of cattle on cotton seed meal and hulls, that the cattle would not eat other feed without loss, and that the delay in getting the cotton seed meal entailed upon him extra labor, expense, and loss in his cattle. This special loss was due to the peculiar circumstances of the plaintiff, and the rule is that, unless such special circumstances are brought home to the other contracting party at the time the contract is made, there can be no recovery of such damages because they cannot reasonably be supported to have been in contemplation of both parties at the time they made the contract. Appellant's counsel concedes the general rule to be as stated, but it is insisted that after he gave notice on November 4th of the peculiar circumstances in which he was placed, and the defendant then agreed to trace the stuff and deliver it as soon as it could, it became liable for the special damages sustained after a reasonable time for the delivery, counted from the date of that notice. But it is not averred that any new contract was made between the parties on November 4th. No new consideration is averred, and, from the allegations of the petition, it cannot be inferred that a new contract was made then. If one party could by a subsequent notice make the other party liable for such special damages, then the rights of the parties would not be determined by the contract between them or by their situation at that time, but by the act of one of the parties alone. The rule that the notice should be given at the time the contract is entered into rests upon the ground that the person to whom the notice is given may have an opportunity to protect himself by the contract which he makes or by special precautions to avoid loss. A notice given afterwards by one party would afford the other party no such opportunity for self-protection. Accordingly, it is held that a notice to the carrier subsequent to the contract and after the goods have been shipped will not make him liable for special damages in cases of this sort. *M., K. & T. Ry. Co. v. Belcher* (Tex. Sup.) 35 S. W. 6; *Crutcher v. Choctaw, etc., R. R. Co.* (Ark.) 85 S. W. 770; *Bradley v. C., M. & St. P. R. R. Co.* (Wis.) 68 N. W. 410, and cases cited.

There was no allegation of a depreciation, or of any injury to the property by the delay. The recovery was sought solely upon the special damages growing out of the loss in the cattle, and, this not being recoverable, the circuit court properly sustained the demurrer to the petition.

Judgment affirmed.

NORTON v. CONSOLIDATED RY. CO.

(Supreme Court of Errors of Connecticut, June 5, 1906.)

[63 Atl. Rep. 1087.]

Carriers—Defective Transfer Ticket—Right of Passenger.*—A passenger who is aboard a street car without a proper transfer ticket due to the negligence of the conductor of the car from which he was transferred is entitled to sue for breach of contract for failure to furnish a proper ticket and recover the loss necessarily following therefrom, but he cannot refuse to pay his fare, and to forcibly resist being expelled from the car, and where he does so, and no more force is used than necessary to remove him from the car, he can only recover nominal damages.

Same—Expulsion of Passenger—Justification.—Where a passenger is aboard a street car, the conductor in charge thereof may refuse to accept the passenger's explanation of the mistake of a conductor in charge of the car from which he was transferred in giving him an erroneous transfer ticket, and require him to pay his fare or leave the car, and after the demands made by the conductor it is the duty of the passenger to either pay the fare or peaceably leave the car.

Same—Regulations—Reasonableness.—A rule requiring the expulsion from a car of a passenger who refuses to either pay his fare or produce a proper transfer ticket showing his right to ride on the car is a reasonable one.

Appeal from Court of Common Pleas, New Haven County; Jacob B. Allman, Judge.

Action by Thomas E. Norton against the Consolidated Railway Company. From a judgment for plaintiff for substantial damages, defendant appeals. Reversed and remanded for assessment of nominal damages.

George D. Watrous and Henry F. Parmele, for appellant.
Benjamin Slade, for appellee.

*For the authorities in this series on the subject of street railway transfers, see foot-notes appended to *Georgia Ry. & Elec. Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789; *Cleveland City Ry. Co. v. Conner* (Ohio), 20 R. R. R. 649, 43 Am. & Eng. R. Cas., N. S., 649.

For the authorities in this series on the subject of the damages recoverable for the ejection of a passenger, or for refusal or failure to carry a passenger, see foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; foot-notes appended to *Elliott v. Southern Pac. Co.* (Cal.), 18 R. R. R. 52, 41 Am. & Eng. R. Cas., N. S., 52.

For the authorities in this series on the subject of the duty of conductors to respect explanations of passengers as to cause of failure to have tickets or the right tickets, see foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340.

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HALL, J. The complaint alleges that the defendant is a common carrier of passengers by an electrical street railway, and that on the day named, while the plaintiff was lawfully riding as a passenger in one of the defendant's cars, and had paid his fare for transportation to Winchester avenue in the city of New Haven, he was unlawfully assaulted by the conductor of the car in attempting to forcibly remove him from the car. As appears from the finding of facts the plaintiff and his wife, who resided on Winchester avenue, and were accustomed to ride upon the street cars in the city, and were familiar with the manner in which they were operated, and with the defendant's system of giving transfers from one line to another, were, in the evening of August 25, 1905, passengers on an electric street car of the Savin Rock Line of the New Haven lines operated by the defendant, and from which line transfer tickets are given to passengers desiring to be transferred to others of the defendant's lines, the names of which are printed upon the transfer tickets, and among which are the Winchester Avenue and the State Street lines. Upon such transfer tickets are also printed: "Not good except at transfer points, and in the direction indicated on first car after time canceled." While on the Savin Rock car the plaintiff paid the fare and requested transfers to the Winchester Avenue line, which connects with the Savin Rock line at the corner of Church and Chapel streets, and from said corner runs westerly along Chapel street. In delivering a transfer to a passenger the conductor punches or perforates it opposite one of the names of lines printed upon it, in such a manner as to indicate upon which line it may be used. The transfers delivered to the plaintiff by the conductor of the Savin Rock car were not punched opposite the name of the line "Winchester Ave.," but were punched opposite the name of the line "State St.," and so as to indicate that the passenger presenting it was entitled to ride upon a car on the State Street line only, which line, from the corner of Church and Chapel streets, extends northerly along Church street. The plaintiff and his wife left the Savin Rock car at the corner of Church and Chapel streets, and entered the first Winchester Avenue car which passed, and upon presenting to the conductor on that car said two transfers was informed by him that they were not good because they were punched for State Street. The plaintiff stated to the conductor that they had just alighted from a Savin Rock car, and had asked the conductor of that car for Winchester Avenue transfers, and that it was not his fault that that conductor had made a mistake, and upon repeated requests refused to either pay his fare, or leave the car. The conductor thereupon attempted to remove the plaintiff from the car by force, using no more force than was necessary and reasonable therefor, but desisted from such attempt, after the plaintiff resisted such removal. Upon these facts the trial court held that the plaintiff was lawfully riding upon the Winchester Avenue car, and had the right to resist the attempt to expel him therefrom, upon his refusal to pay his fare; that the

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conductor was not justified in attempting to expel the plaintiff, and that he unlawfully assaulted him, and rendered judgment for the plaintiff for \$200 as substantial damages.

This is an action to recover damages for the alleged tort of the defendant's servant in attempting to forcibly eject the plaintiff from the car, and not for the recovery of damages for a breach of the contract of carriage between the plaintiff and defendant. The defendant justifies the attempted expulsion of the plaintiff upon the ground that the latter unlawfully persisted in remaining and riding in the car, without either paying his fare or producing a transfer ticket purporting to entitle him to ride in that car; and that no unreasonable force was used in the attempt to remove him. As it is found that no unnecessary force was employed, the case must turn upon the question of whether upon the facts stated, the plaintiff had the right to insist upon being carried upon the transfer ticket which he presented, and to forcibly resist the conductor's attempt to expel him.

The plaintiff contends that though the transfer check may have been *prima facie* evidence of a different contract of carriage, yet the facts show that when he paid his fare to the conductor upon the Savin Rock car, and requested of him a transfer to Winchester Avenue, the real undertaking of the defendant was to carry him by a Winchester Avenue car, and that having informed the conductor of the Winchester Avenue car of these facts, and of the mistake of the conductor of the Savin Rock car in wrongfully punching the transfer, he was entitled to be carried upon the Winchester Avenue car. In the absence of any statutory or other express provision or regulation defining the contract of carriage between electric street railway companies, and the rights of their passengers in cases like the present, they must be ascertained by considering all the circumstances indicating the intention and understanding of both parties including not only what is required for the reasonable safety, convenience and comfort of passengers, but what is reasonably necessary to enable the company to properly perform the functions for which it was created and what the known and reasonable rules of the company are with reference to which the parties are presumed to have contracted.

There are certain facts and established rules connected with the operation of electric street railways, which in these days are familiar to every person of ordinary intelligence who has occasion to ride on them, and which are to be regarded in determining what the real contract of carriage is in a case like the present one. Among them are, that the mere payment of the ordinary fare in a street car does not, of itself, as upon a steam railroad, indicate the destination of the passenger, nor suggest that he desires transportation by another line and upon another car; that a passenger upon one line desiring to be transferred to another, operated by the same company, must pay his cash fare on the first car; that upon such payment he will be carried, in that car, to the point of transfer to the second line; that before leaving the

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There are certain facts and established rules connected with the operation of electric street railways, which in these days are familiar to every person of ordinary intelligence who has occasion to ride on them, and which are to be regarded in determining what the real contract of carriage is in a case like the present one. Among them are, that the mere payment of the ordinary fare in a street car does not, of itself, as upon a steam railroad, indicate the destination of the passenger, nor suggest that he desires transportation by another line and upon another car; that a passenger upon one line desiring to be transferred to another, operated by the same company, must pay his cash fare on the first car; that upon such payment he will be carried, in that car, to the point of transfer to the second line; that before leaving the

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first car he must obtain from the conductor of it a ticket indicating upon its face his right to take passage upon a car of the second line; that as to the conductor upon the second car, the person receiving such transfer ticket enters that car like all other passengers taking the car at that point, and will not be permitted to ride unless he either pays his fare or presents a proper transfer; that it is the office of the conductor of the second car to determine the right of the passenger to ride upon that car, and that upon the presentation of a transfer ticket, the ticket itself is the only evidence of such right which the conductor can properly accept. In our opinion, the facts fail to show that when, on the Savin Rock car, the plaintiff paid his fare and asked for a transfer to Winchester Avenue, the defendant undertook absolutely to carry him upon a Winchester Avenue car, even if he failed to either pay his fare, or present a proper transfer ticket on that car. They show that the real contract of the defendant was to carry the plaintiff, upon the first car, to the proper point of transfer to the second line; to furnish him a proper transfer ticket to entitle him to a passage on a car of the second line; and to carry him upon that line, upon the presentment of such transfer or the payment of his fare to the conductor of the second car. Through the carelessness of its servant, in not giving the plaintiff the transfer ticket which he asked for, the defendant failed to perform its contract. For such breach of contract the plaintiff would have been entitled to compensation for the loss or injury, had there been any, which necessarily followed from the defendant's failure to furnish him a proper transfer ticket. His remedy for such breach of contract was not to refuse to pay his fare, and to forcibly resist being expelled from the car. As the transfer ticket which he presented did not even purport to authorize him to ride on a Winchester Avenue car, the conductor of that car, notwithstanding the plaintiff's explanation of the mistake, was justified in refusing to accept it, and in requiring him to pay his fare or leave the car, and after the demands made by the conductor, it became the plaintiff's duty to either pay his fare or peaceably leave the car. *Downs v. New York & N. H. R. Co.*, 36 Conn. 287, 291, 4 Am. Rep. 77; *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69, 88; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581; *Crowley v. Fitchburg & L. Street Ry. Co.*, 185 Mass. 279, 70 N. E. 56; *Thorp v. Concord R. Co.*, 61 Vt. 378, 17 Atl. 791; *Monnier v. New York C. & H. R. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619; *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Brown v. Rapid Ry. Co.*, 134 Mich. 591, 96 N. W. 925; *Keen v. Detroit Electric Railway*, 123 Mich. 247, 81 N. W. 1084; *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; *West Maryland R.*

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Co. v. Schaun, 97 Md. 563, 55 Atl. 701; Western Maryland R. Co. v. Stockdale, 83 Md. 245, 34 Atl. 880; McKay v. Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913; McGhee v. Reynolds, 117 Ala. 413, 23 South. 68.

A rule requiring the expulsion from a car of a passenger who refuses to either pay his fare or produce a ticket showing his right to ride on such car is a reasonable one (*Downs v. New York & N. H. R. Co.*, 36 Conn. 287, 291, 4 Am. Rep. 77; *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69, 88; *Townsend v. New York C. & H. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Shelton v. Lake Shore & M. S. R. Co.*, 29 Ohio St. 214), and one which, from the fact that it is so general with carriers, as well as from the facts found in this case, was evidently well known to the plaintiff. In ascertaining whether the plaintiff was entitled to ride on the Winchester Avenue car, it was not the duty of the conductor of that car to accept the statement made to him by the plaintiff that the mistake in his transfer was the fault of the conductor of the Savin Rock car. *Townsend v. New York C. & H. R. R. Co.*, 56 N. Y. 295, 14 Am. Rep. 419; *Downs v. Hartford & N. H. R. Co.*, 36 Conn. 287, 291, 4 Am. Rep. 77. As between the second conductor and the plaintiff, the transfer ticket was conclusive as to the latter's right to be carried as a transferred passenger upon the Winchester Avenue car. "As between the passenger and the conductor of the car in which he is, the terms of the ticket or check are conclusive, and the right to ride upon it on that train is, for the time being, to be determined accordingly." Baldwin on American Railroad Law, p. 292; *Mosher v. St. Louis, I. M. & S. Ry. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Poulin v. Canadian Pac. Ry. Co.*, 3 C. C. A. 23, 52 Fed. 197, 17 L. R. A. 800, and cases above cited. There is a conflict of authorities in other jurisdictions upon the questions of the conclusive character of such a ticket, as between the passenger offering it and the conductor to whom it is presented; of the terms of the contract of carriage; and of the right of the passenger to forcibly resist expulsion in cases like the present one. In the case of *Indianapolis Street Ry. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. Rep. 261, decided in 1903, in which the claims of the present plaintiff are sustained by the majority opinion, these questions are very ably discussed and the authorities fully cited upon both sides. In our view the dissenting opinion of Judge Gillett, in which Judge Monks concurred, is sustained by the better reasons and by the greater weight of authority.

Our conclusion is that the plaintiff, having by his own wrongful conduct invited the use of force, cannot now complain of the use by the defendant of reasonable force in the attempt to remove him from the car. The trial court erred in holding that the plaintiff was entitled to substantial damages.

There is error, and the case is remanded for the assessment of nominal damages. In this opinion the other Judges concurred.

CHICAGO CONSOLIDATED TRACTION CO. *v.* SCHRITTER

(Supreme Court of Illinois, Oct. 23, 1906.)

[78 N. E. Rep. 820.]

Carriers—Street Railroads—Injuries to Passenger—Contributory Negligence—Position—Standing on Step.*—Where a street car on which plaintiff was riding at the time of his injury was so crowded that plaintiff could not secure a safer place than the step on which to ride, whether plaintiff was guilty of contributory negligence in riding on the step was for the jury.

Appeal—Intermediate Appeal—Questions of Fact—Conclusiveness†—In an action for injuries to a passenger on a street car, whether plaintiff could have secured a safer place to ride than on the step, and was therefore guilty of contributory negligence in riding there, was a controverted question of fact, the determination of which by the Appellate Court was conclusive on a further appeal to the Supreme Court.

Carriers—Injury to Passengers—Care Required.*—It is the duty of a street railroad company, as a matter of law, to use the highest degree of care and caution consistent with the practical operation of the road, to provide for the safety and security of passengers while being transported.

Evidence—Weight and Sufficiency.—In an action for injuries to a passenger, plaintiff is only bound to prove his case by preponderance of the evidence, and not beyond a reasonable doubt.

Damages—Mental Suffering.‡—A passenger who suffered bodily injury as the result of an accident for which the carrier was liable, was entitled to recover for such mental suffering as was the natural and inevitable result of his injuries.

Trial—Instructions—Damages—Applicability to Issues.—Where, in an action for injuries to a passenger, a declaration alleged that plaintiff had been obliged to expend divers large sums of money, amounting, to wit, to the sum of \$1,000, and had obligated himself to pay out large sums of money, to wit, \$1,000, an instruction authorizing consideration of any necessary expense plaintiff may have been put to "or may have obligated himself to pay," in and about plaintiff's treatment for his injuries, was not objectionable as beyond the is-

*See foot-notes appended to *Gaffney v. Union Traction Co.* (Pa.), 17 R. R. R. 661, 40 Am. & Eng. R. Cas., N. S., 661.

†See foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782; foot-notes appended to *Alton Light & Traction Co. v. Oliver* (Ill.), 20 R. R. R. 33, 43 Am. & Eng. R. Cas., N. S., 33.

‡For the authorities in this series on the question whether or not there may be a recovery on account of mental suffering in negligence cases, see foot-notes appended to *Kelley v. Ohio River R. Co.* (W. Va.), 19 R. R. R. 807, 42 Am. & Eng. R. Cas., N. S., 807; foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; *Eller v. Carolina & W. Ry. Co.* (N. Car.), 18 R. R. R. 609, 41 Am. & Eng. R. Cas., N. S., 609.

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sues, in so far as it authorized consideration of expenses plaintiff had obligated himself to pay.

Damages—Personal Injuries—Earning Capacity—Evidence.—Plaintiff's thumb and little finger were torn off and the hand so injured and lacerated as the result of defendant's negligence that it was almost useless. Plaintiff was a machinist, and the year prior to his injury had earned \$900 at his trade, but had been unable to work at his trade since the injury, and his capacity to perform any kind of labor had been permanently impaired. Held, that such facts were sufficient to justify a recovery for depreciated capacity to earn money in the future.

Carriers—Injuries to Passengers—Negligence of Motorman—Instructions.—Where, in an action for injuries to a passenger on a street car, it was a question for the jury whether the motorman was negligent in failing to guard against collision with a wagon, though it was conceded that after the wagon left the track it halted, swerved, or even backed a few inches, an instruction that, if, after the wagon had left the track a sufficient distance to permit the car to pass in safety, and after the forward end of the car had passed the rear of the wagon, without notice to those in charge of the car, the horse suddenly backed the wagon so that it came in contact with the side of the car and plaintiff was thereby injured, the jury should find defendant not guilty, was properly refused.

Trial—Instructions—Direction of Verdict.—Where an instruction directs a particular verdict if the jury finds certain facts and conditions, the instructions must embrace all the facts and conditions essential to such verdict.

Carriers—Injuries to Passengers—Assumed Risk.—The law of assumed risk is inapplicable to an action for injuries to a passenger on a street car caused by a collision between the car and a vehicle.

Appeal from Appellate Court, First District.

Action by Joseph Schritter against the Chicago Consolidated Traction Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant.

Charles Lane, for appellee.

FARMER, J. This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the circuit court in favor of appellee for \$9,000 for damages sustained as the result of an injury received while a passenger on one of appellant's cars.

Near dark on the evening of October 18, 1901, appellee boarded an electric car of appellant, called an Easton avenue car, at Milwaukee avenue and Lake street, which was some distance from Easton avenue. He took position and rode on the step at the front end for the motor car. The step set in the platform so that it did not extend beyond the side or the body of the car. Appel-

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lee paid his fare while standing in that position, holding on to the grab iron at the side of the front end of the car. The grab iron was 3 to 3½ feet long, set in sockets at each end, and extended out from the body of the car 1¾ inches. When the car reached Easton avenue its course was then north, and as appellee stood on the step holding the grab iron with his right hand he faced east. As the train, which was composed of the motor car on which appellee was riding and a trailer, proceeded north, it approached and overtook a man driving one horse hitched to a heavy truck wagon of the Northwestern Yeast Company. The wagon was being driven along the street car tracks, and the motorman, as he came near it, sounded the gong to warn the driver to leave the track. The wagon, at the time the street car overtook it, was opposite some vehicles standing in the street between the street car track and the sidewalk on the right hand or east side, so that the driver had to pass them before he could turn his horse and wagon off the track. After passing these obstructions the driver turned his horse off the track, and the wheels of the wagon, after following the tracks a short distance, left the tracks also. The wagon was a platform wagon, with upright stakes along its sides and rear. To these stakes or some of them, iron rope hooks were attached about 15 inches above the platform and extending outward. When the wheels of the wagon left the street car tracks appellant's motorman turned on the power to give his train more speed and pass the horse and wagon. In attempting to pass them an iron rope hook on a rear stake in the wagon caught the grab iron appellee was holding to, tore it off the car and seriously and permanently injured his hand and arm.

It was first contended by appellant that the verdict was not supported by the evidence. This contention is based chiefly on the fact that appellee was riding on the steps of the car at the time he was injured. It is not and could not reasonably be claimed that this constitutes negligence under all circumstances or as a matter of law. Whether such conduct constitutes negligence or not is a question of fact for determination by the jury. *Alton Light & Traction Co. v. Oller*, 217 Ill. 15, 75 N. E. 419; *North Chicago Street Railroad Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793; 3 *Thompson on Negligence*, §§ 2955, 2957. But it is argued that under the circumstances of the case, as shown by the evidence, appellee could have occupied a safer place on the platform, and therefore was guilty of contributory negligence in not doing so. There was evidence tending to show that the car and platform were so crowded with passengers that appellee could not secure a safer place to ride. This was a controverted question of fact, and the judgment of the Appellate Court on that question is binding upon us. *Sconce v. Henderson*, 102 Ill. 376; *Thomas Pressed Brick Co. v. Herter*, 162 Ill. 46, 44 N. E. 380; *Henry v. Stewart*, 185 Ill. 448, 57 N. E. 190; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529.

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It is also urged that the court erred in giving appellee's first, third, and seventh instructions, and in refusing the eighth and ninth instructions asked by appellant. Appellee's first instruction was as follows: "The court instructs the jury, as matter of law, that it is the duty of a street railroad company to use the highest degree of care and caution, consistent with the practical operation of the road, to provide for the safety and security of passengers while being transported." This instruction has been approved in *West Chicago Street Railroad Co. v. Johnson*, 180 Ill. 285, 54 N. E. 334, and *West Chicago Street Railroad Co. v. Kromshinsky*, 185 Ill. 92, 56 N. E. 1110, and is not in conflict with *North Chicago Street Railroad Co. v. Polkey*, *supra*.

Appellee's third instruction told the jury he was not bound to prove his case beyond a reasonable doubt, but was only required to prove it by a preponderance of the evidence. No reason is given why this is not a good instruction, and we know of none that could be given.

Appellee's seventh instruction was on the measure of damages, and told the jury, among other elements mentioned, that they might consider "to what extent, if any, he may have endured physical and mental suffering as a natural and inevitable result of such injuries." The criticism made of this portion of the instruction is that it authorizes damages for mental suffering. This has been approved in a long line of cases in this state where there had been a physical injury inflicted. In *Indianapolis & St. Louis Railroad Co. v. Stables*, 62 Ill. 313, it was said (page 320): "And a reference to adjudged cases shows the current of authority is the other way. In fact, we cannot readily understand how there can be pain without mental suffering. It is a mental emotion arising from a physical injury. It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpowered and consciousness is destroyed. The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury." This has been adhered to in *Hannibal & St. Joseph Railroad Co. v. Martin*, 111 Ill. 219; *Chicago City Railway Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Cicero & Proviso Street Railway Co. v. Brown*, 193 Ill. 274, 61 N. E. 1093, and many other cases. *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, cited by appellant, is not in conflict with these cases. In that case there was no physical injury. The alleged injury complained of resulted from fright. The same instruction also told the jury they might consider any necessary expense appellee may have been put to "or may have obligated himself to pay," if any were proven, in and about treatment and care of himself on account of his injuries, and what, if any, effect his injuries "will have on him in the future in regard to his power to earn money by his labor." It is asserted the declaration charges appellee had "expended large

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sums of money" for medical services, and not that he "had become liable" for expenses for treatment, and it is so abstracted. This is the only objection made to that branch of the instruction. The record shows the allegation in the declaration to be that appellee had been obliged to "expend divers large sums of money amounting, to wit, to the sum of \$1,000, and had obligated himself to pay out large sums of money, to wit, \$1,000." The evidence shows appellee's thumb and little finger were torn off, and the hand so injured and lacerated as to render it almost useless. He was a machinist, and the year before he was injured had earned \$900 working at his trade. It was the right hand that was injured, and he has not been able to work at his trade since his injury, and the proof shows his capacity to perform any kind of labor has been permanently impaired. There was no error in the instruction.

Appellant offered, and the court refused, an instruction in substance to the effect that if the jury believe, from the evidence, that the car and wagon were going in the same direction, and that the team and wagon turned off the track a sufficient distance to allow the car to pass in safety, and that after the forward end of the car had passed the rear end of the wagon, without notice to those in charge of the car the horse suddenly stopped and backed the wagon so that it came in contact with the side of the car, and thereby plaintiff was injured, the jury should find defendant not guilty. One of the theories of the defense was that after leaving the street car tracks a horse and milk wagon crossed in front of the horse drawing the wagon that had just left the tracks and caused that horse to back slightly, thereby bringing the hook in contact with the grab iron on the car—and there was some evidence tending to support this theory. The elements contained in the instruction were proper to be considered by the jury in determining whether the appellant's motorman was guilty of negligence that caused the injury, but as it directed a verdict for defendant it was properly refused. The evidence relied on by appellant shows the wagon could have been but a few inches from the street car track. One of the witnesses testified the horse backed the wagon three inches. It is clear that if the wagon was ever far enough from the track to allow the car to pass it was by a narrow margin. It was the duty of the motorman to keep a careful watch ahead for obstructions that were in or liable to get in his way. He testified he was behind time and was hugging the wagon closely, putting on and taking off the power, and that when the wagon got clear of the track he turned on the power. The Appellate Court properly said on the subject: "It was also a question for the jury, even if it be conceded that the wagon did halt or swerve or even back a few inches more or less, whether it was or was not negligence for the motorman not to guard against such contingency until the wagon was at least far enough away from the track to make it improbable, at least, that such halting or backing

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would endanger the passengers on the car." The instruction as asked practically took this element away from the consideration of the jury. Each party to a suit, it is true, is entitled to have instructions given that will fairly present his theory of the case, but such instructions must contain a correct statement of the law applicable to the evidence. Where an instruction directs a particular verdict if the jury should find certain facts and conditions, the instruction must embrace all the facts and conditions essential to such a verdict. *Illinois Iron and Metal Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008. Furthermore, appellant had the benefit of the law in other instructions informing the jury as to what their verdict should be if the evidence failed to show appellee's injury was caused by the negligent operation of the car.

Appellant's sixteenth instruction told the jury that if they believed, from the evidence, the injury to the plaintiff was caused by the negligent manner in which the horse and wagon were driven or managed, they should find the defendant not guilty. The seventeenth told the jury that if they believed from the evidence, plaintiff's injury was the result of an inevitable accident, or that it was caused by the negligence or conduct of those in charge of certain teams and wagons and without the negligence of defendant, then they should find the defendant not guilty.

Complaint is also made of the refusal of the court to give the ninth instruction asked by appellant. That instruction was on the law of assumed risk. This was not a case where the doctrine of assumed risk was applicable. If there was anything in the position appellee occupied on the step of the car that would bar a recovery, it was contributory negligence, and on this subject the instructions given on behalf of appellant were full and complete.

Finding no reversible error in this record, the judgment is affirmed.

Judgment affirmed.

FORSYTHE v. LOS ANGELES RY. CO. et al.

(Supreme Court of California, Aug. 17, 1906. Rehearing Denied Sept. 13, 1906.)

[87 Pac. Rep. 24.]

Carriers—Injury to Passengers—Negligence.*—Where a passenger on a street car, free from contributory negligence, was injured in a collision between the car and a wagon of a third person, the negligence of the third person was no defense where the street railway company's negligence, in whole or in part, caused the injury, it owing to the passenger the highest care.

Same.—In an action for the death of a passenger on a street car

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see preceding case, and footnotes.

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in a collision between the car and a wagon of a third person, the evidence showed that the motorman saw the wagon approaching the track but did not check the speed of the car till he was so close to the wagon that a collision was inevitable. Held that, though it might have been the duty of the driver of the wagon to have stopped until the car had passed, the motorman did not exercise the highest care toward the passenger because he failed to stop the car, though knowing that a collision would ensue.

Appeal—Party Aggrieved.—In an action for the death of a passenger on a street car, in a collision between the car and a wagon of a third person, brought against the railway company and the third person, judgment was rendered against the company and in favor of the third person. Held, that the company was not a party aggrieved by the refusal to render judgment against the third person; there being no right of contribution between the codefendants.

Contribution—Torts—Joint Wrongdoers—Statutes.—Code Civ. Proc. § 709, providing that where property liable to an execution against several persons is sold thereon, are more than a due proportion of the judgment is satisfied out of the proceeds of the property of one of them, he may compel contribution from the others, etc., does not change the rule that there is no right of contribution between joint tort-feasors, but merely gives to a judgment debtor entitled to contribution the summary remedy of using the judgment itself to enforce contribution in the manner prescribed.

Appeal—Motion for New Trial—Review of Evidence.—Where, in an action for negligence, plaintiff does not move for a new trial, the court, on appeal, cannot consider the question of the sufficiency of the evidence to show negligence.

Trial—Findings—General and Special Findings—Consistency.—In an action for the death of a passenger on a street car, in a collision between the car and a wagon of a third person, brought against the street railway company and the third person, the court found that the death of the passenger was not caused by the negligence of the third person, but solely by the negligence of the company. The court further found that the driver of the wagon saw the car approaching when it was about 125 feet distant from the point of the accident and did not stop his team until too late. Held that, as the car was operated on a street, it could not be said that the driver of the wagon did not exercise reasonable judgment in determining that he could pass the crossing before the car would reach him, and a judgment in favor of the third person was authorized.

Same.—The finding of the ultimate fact prevails in support of the judgment, notwithstanding a finding of probative fact which tends to show that the ultimate fact is against the evidence.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Sarah C. Forsythe, administratrix of J. W. Forsythe, deceased, against the Los Angeles Railway Company and another. There was a judgment for plaintiff against defendant Los Angeles

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Railway Company and in favor of defendant Los Angeles Hay Storage Company, and plaintiff and defendant Los Angeles Railway Company appeal. Affirmed.

Valentine & Newby and Bicknell, Gibson, Trask, Dunn & Crutcher, for appellant.

E. W. Freeman, A. D. Laughlin, and Henry J. Stevens, for respondents.

McFARLAND, J. On the 16th day of March, 1903, J. W. Forsythe, since deceased, was a passenger on a street car of the defendant the Los Angeles Railway Company, which was running southerly on Main street in the city of Los Angeles. He was seated in the front part of the car on the easterly side, and in a seat provided by the railroad company for passengers. As the car was crossing Seventh street there was a collision between the car and a large, heavily loaded wagon of the other defendant, the Los Angeles Hay Storage Company, and driven by one of its employees; and by this collision the said Forsythe received injuries from which he afterwards died. This action was brought by his administratrix, who is also his widow, against both of said defendants to recover damages for his death, the plaintiff alleging that the death was caused by the negligence of both the said defendants. (For brevity, the said first-named defendant will be hereafter called the "Railway Company," and the other defendant the "Storage Company.") The case was tried without a jury, and the court found that the injuries were caused by the negligence of the said Railway Company, and that the other defendant, the Storage Company, was not guilty of any negligence in the premises. It found the amount of the damage to be \$4,000, to which finding no exception is taken, and it rendered judgment for plaintiff against the Railroad Company for the aforesaid amount of money, but rendered judgment for costs against plaintiff in favor of the Storage Company. The defendant the Railroad Company, made a motion for a new trial, which having been denied, it appeals from the order denying said motion, and also from the judgment. The plaintiff, being dissatisfied because judgment was not given her also against the Storage Company, moved the court, under sections 663 and 663½ of the Code of Civil Procedure, to amend the conclusions of law so as to show that plaintiff was entitled to judgment against both defendants, and, this motion having been denied, the plaintiff appeals from the order denying it, and also from that part of the judgment which is in favor of the said Storage Company and against plaintiff, and which adjudged that the plaintiff take nothing against said defendant, and that the latter recover its costs against plaintiff. Plaintiff did not make any motion for a new trial.

1. Appeals of the Railway Company.

This appellant saved a few exceptions to rulings as to the advisability of evidence, but we do not think it necessary to notice these exceptions in detail, because they relate to trivial mat-

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ters which could have had no effect upon the decision of the case. The main contention is that the evidence is not sufficient to support the finding that the collision was caused by any negligence of appellant, but this contention is not maintainable. No doubt the appellant makes a strong showing that the other defendant, the Storage Company, was guilty of negligence which contributed to the accident, and, in an action brought by the Storage Company to recover damages from the Railway Company for injury done to its team by the collision, the Railroad Company would perhaps have a good defense in the contributory negligence of the plaintiff in such an action. But the deceased was not guilty of any contributory negligence, and, if the negligence of the Railway Company was a cause of the damage, it has no defense to this present action in the fact that the negligence of the Storage Company also contributed to that damage. This appellant must show that it was not guilty of any negligence which, in whole or in part, caused the injury; and we do not think that it makes such showing. It must be remembered that the deceased was a passenger on appellant's car, and that it owed him the very highest care. Immediately before the accident the driver of the hay wagon going westerly along Seventh street was about 40 feet distant from the point of the accident when he was seen by the motorman of the car of the appellant, which was coming at the rate of about eight miles an hour southerly on Main street towards the place where the driver would cross Main street if he kept on his course. The motorman was about 125 feet from the point of the accident when he saw the driver of the wagon thus closely approaching the crossing. Neither the driver nor the motorman made any effort to avoid the collision until it was too late to accomplish that result. The court found, and the evidence supports the finding, "that said motorman, seeing said hay wagon, did not check the speed of said car until it reached Seventh street, when he threw off the current; that neither the said driver nor the said motorman made any attempt to stop his respective vehicle until the same was so close to the said point of accident that a collision was inevitable;" that the motorman did not apply his air brakes until he was nearly at the center of Seventh street, when he did apply the brakes and "stopped the car within 15 or 20 feet," and that "when the said motorman applied the air brakes both the said car and the said hay wagon were within a few feet of the point of collision." Appellant contends that it was the duty of the driver of the wagon to stop, until the car had passed, and that therefore the motorman was not negligent in continuing at the usual speed; and there is a good deal of argument on the question whether or not the car had a right of way over the crossing superior to that of the wagon. These questions would be significant in an action brought by one of the two defendants against the other for damage to the plaintiff in such an action caused by the collision. But in the case at bar the railroad company should have exercised the highest care

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towards the deceased; and it certainly cannot be truly said that the motorman did exercise the highest degree of care to protect his passengers, when, seeing the team closely approaching the crossing, with no evidence of the driver's intention to stop, and, knowing that if he continued on his course a collision would be inevitable, he made no reasonable effort to avoid such collision. Whatever chances he might have taken as to liability for damages to the team and driver, he had no right to expose his passengers to the danger of a collision which seemed likely to occur and which he might have easily prevented.

This appellant further contends that even if the judgment against it could be considered as right, still the court erred in not also rendering judgment against the other defendant, the Storage Company, because, as is claimed, the evidence showed that the said other defendant was also guilty of negligence which contributed to the injury. But the appellant is not a party aggrieved by the refusal of the court to give judgment against the Storage Company, even if such refusal could be considered erroneous as against plaintiff. It is beyond doubt the well-established general rule that there is no right of contribution between joint tort-feasors. Appellant contends that this rule has been changed by section 709 of the Code of Civil Procedure; but we do not think so. That section does not pretend to deal with the matter of the right of contribution between tort-feasors. Its plain intent is to simply provide that, when there is a judgment against two or more defendants who are entitled to contributions from each other and one pays the whole or more than his proportion thereof, "the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days after his payment he files with the clerk," etc. It simply gives to a judgment debtor entitled to contribution the summary remedy of using the judgment itself to enforce the contribution, and relieves him of the necessity of pursuing some more tedious and inadequate proceeding for enforcing said contribution. It is only an amendment to the law of procedure; and the general rule is that an amendment to or provision in the law of procedure does not change the substantive law, unless the language used necessarily leads to that result. And it certainly cannot be said that the Legislature while enacting section 709 as a part of the law of procedure necessarily intended to change, or did change, the fundamental principle that there is no right of contribution between joint tort-feasors. Moreover, the section in terms relates only to cases where judgments had been rendered, and therefore it does not apply to the case at bar.

2. The appeals of the plaintiff.

On these appeals plaintiff contends that the court should have given her judgment against the Storage Company as well as against the railroad company. As this appellant did not move for a new trial we cannot, on her appeal, consider the question of whether or not the evidence shows negligence on the part of

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the Storage Company; we can look only at the findings. Appellant contends that upon the findings judgment should have gone against the Storage Company. But the court found the ultimate fact that the collision and the injuries to the deceased "were not caused by the negligence of the defendant, Los Angeles Hay Storage Company, or by any of its agents, servants, or employees, but solely by the negligence of the agents," etc., of the railroad company. Appellant contends that this finding of the ultimate fact should be considered as overcome by certain findings of probative facts which are claimed to be inconsistent with the finding of the ultimate fact; but this contention cannot be maintained. The findings of the probative facts relied on are that the driver of the wagon saw the car approaching when it was about 125 feet distant from the point of the accident and did not stop his team, but did afterwards, when it was too late, attempt to stop, but "the wagon was loaded with three or four tons of hay and was of unwieldy bulk and weight, and was then so close to the track, and to the car of said defendant, the Los Angeles Railway Company, that before the wagon could be entirely stopped the end of its tongue struck said car and scraped along its side." In the first place, it does not clearly appear that these findings of the probative facts are inconsistent with the finding of the ultimate fact. The railroad operated by the railroad company was a street railroad, not a steam railroad running through the country at great speed and with heavy trains which cannot, like a street car, be stopped within a short distance; and, under the circumstances detailed by the findings, we could not well say that the driver of the wagon did not exercise reasonable judgment in determining that he could pass the crossing before the car would reach him, and in not trying to stop sooner than he did. But, in the second place, the general rule is that the finding of the ultimate fact prevails in support of the judgment notwithstanding a finding of a probative or evidentiary fact which tends to show that the ultimate fact was found against the evidence. And findings of probative facts will not invalidate the finding of an ultimate fact unless the latter is based on the former, and is entirely overcome thereby, and unless, also, it appears that these findings of probative facts dispose of all the facts involved in the pleadings, and that the facts found constitute all the facts in the case. *Semple v. Cook*, 50 Cal. 26; *Smith v. Acker*, 52 Cal. 219; *Wood v. Pendola*, 78 Cal. 287, 20 Pac. 678; *Commercial Bank v. Redfield*, 122 Cal. 407, 55 Pac. 160, and cases there cited. And such a condition is certainly not presented in the case at bar.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

LOUISVILLE & N. R. CO. *v.* DUNLAP.

(Supreme Court of Alabama, June 30, 1906.)

[41 So. Rep. 826.]

Carriers—Injury to Goods—Exemption from Liability—Burden of Proof.*—Defendant, in an action for injury to goods while in its possession as carrier, has the burden of showing its exemption from liability, under the provision of the bill of lading that it should not be liable for injury by robbery, riots, and strikes.

Same—Injury by Robbers.—A mere depredator is not a robber, within a bill of lading exempting a carrier from liability for injury to the shipment caused by "robbery."

Same—Nature of Possession of Goods—Evidence.—For the purpose of showing that goods, when injured, were in the possession of defendant as carrier and not as warehouseman, evidence that the failure of defendant's agent to deliver the goods on the morning of their arrival, before they were injured, to those plaintiff sent for them, was wrongful, is material.

Damages—Evidence.—It is competent for a witness who had seen goods in their damaged condition soon after oil had been poured over them to testify in an action for damages therefor as to their condition six months thereafter, as tending to show the lasting effect the oil had on them.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Action by Alex Dunlap against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Tillman, Grubbs, Bradley & Morrow, for appellant.

Frank S. White & Son, for appellee.

TYSON, J. The defendant is sought in this action to be made liable as a common carrier for damages sustained by plaintiff to his goods, which were injured by kerosene oil being poured over them while in the depot structure of defendant. It is not insisted that defendant's common-law liability, which is that of an insurer, and therefore absolute, had terminated, and that of warehouseman had commenced, when the injury to the goods oc-

*For the authorities in this series on the subject of the burden of proving the carrier's liability, when such liability is limited, see footnotes appended to *Michaels v. Adams Exp. Co.* (N. J.), 19 R. R. R. 341, 42 Am. & Eng. R. Cas., N. S., 341; *Kansas City, etc. Co. v. Heard* (Miss.), 19 R. R. R. 755, 42 Am. & Eng. R. Cas., N. S., 755; footnotes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787; *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88.

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curred. The condition of the goods is not denied, neither is there a controversy that such damage occurred to them while in defendant's possession. But defendant undertook to relieve itself of its common-law liability as an insurer by a special exception contained in the bill of lading which it issued to plaintiff. This exception was made the subject-matter of a special plea. The averment of the plea is that "in consideration of a reduced rate [which was granted to the plaintiff] the defendant shall not be liable for any loss to the property or for damage thereto caused by robbery, riots, and strikes while said shipment was in transit or while in depot at point of delivery, and the defendant avers that the damage to said shipment was caused either by robbers, riots, or strikes while in transit or in depot at point of delivery and without fault or negligence on its part."

It is not doubted but that plaintiff was bound to prove no more than that the goods were delivered to defendant and that they were damaged while in its possession, to make out a *prima facie* case for a recovery. When this was shown, as was done, the onus was then cast on the defendant to bring itself within the exception pleaded. In other words, it was incumbent upon defendant to make a *prima facie* case of exculpation. *Gray's Ex'r v. Mobile Trade Company*, 55 Ala. 387, 399, 28 Am. Rep. 729. And in order to do this it was incumbent upon it to introduce evidence from which the jury would be authorized to find, or at least to infer, that the damage or injury done the goods was the act of a robber, rioter, or striker; for clearly, as to all other acts resulting in damage to them by whomsoever committed, if committed by a person not within the class named, the exception, or rather the exemption from its common-law liability, as shown by the exception, has no application, and that rule of liability is, of course, unaffected, and must govern. It is not insisted that the testimony in any degree shows that the kerosene oil was poured upon the goods by a rioter or striker within the meaning of those terms as employed in the exception. The insistence is that the act of depredation was committed by robbers, and yet it is conceded that it did not constitute legal robbery. The contention on this point is that the word "robbers" is to be taken in its ordinary sense, and not in its technical legal sense; that one of its synonyms is "depredator," etc. In the absence of something in the context to obviously show that the word was used in its ordinary sense, instead of its legal sense, its legal significance must be adopted. *Bragg v. State*, 134 Ala. 172, 32 South. 767; *Endlich on the Interpretation of Statutes*, § 75; 17 Am. & Eng. Ency. Law (2d Ed.) p. 13.

The defendant having failed to exculpate itself from its common-law liability, the general affirmative charge, if requested by plaintiff, could have been properly given for him. This, of course, renders it unnecessary to review the exceptions reserved to the oral charge of the court, and its refusal to give the several written charges requested by defendant.

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There remains only two other assignments of error to be disposed of. Both are predicated upon rulings of the court in admitting testimony against defendant's objection. The objection interposed to the question propounded to plaintiff on redirect examination was that it called for immaterial testimony. The answer to it was not only not immaterial, but relevant to the issue. It tended to show that the failure of defendant's agent to deliver the goods on the morning of their arrival, before they were damaged, to those whom plaintiff sent for them, was wrongful. In other words, it tended to establish that its station agent whose duty it was to deliver the goods to plaintiff was without proper excuse to do so. The pertinency of this is quite apparent in view of the fact, under the circumstance shown by the testimony, that it was important under the proceedings that defendant's common-law liability be shown not to have been terminated and that of warehouseman begun. *L. & N. R. R. Co. v. McGuire*, 79 Ala. 395.

Nor is there any merit in the remaining assignment. The witness had seen the goods in their damaged condition soon after the oil had been poured over them. It was, therefore, competent to ask him what their condition was six months after that, as tending to show the extent and lasting effect the oil had upon them.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

CALENDER-VANDERHOOF Co. v. CHICAGO, B. & Q. Ry. Co.

(Supreme Court of Minnesota, Nov. 2, 1906.)

[109 N. W. Rep. 402.]

Carriers—Injury to Shipment—Inclement Weather.—It being a hazardous and unusual proceeding to ship apples in bulk in box freight cars from the state of New York to Minneapolis, Minn., during the month of November, owing to the liability of encountering cold weather, a connecting railroad at Chicago, over which the car is routed to the point of delivery, is not required to anticipate that a car of apples so loaded will be delivered upon its yard tracks, and be prepared to take extraordinary precautions to protect the fruit from frost.

Same—Duties of Carrier.—Under the evidence, if true, appellant exercised reasonable care in receiving and forwarding the fruit, and it was error to instruct the jury that they might consider whether appellant was required to immediately transfer the fruit to another car, or send the car to a roundhouse.

Same—Contributory Negligence.*—The fact that the shipper packed

*See generally, extensive note, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419; *Carpenter v. Baltimore & O. R. Co.* (Del. Sup'r Court), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679.

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and shipped fruit in the manner indicated, at that season of the year, did not constitute contributory negligence so as to preclude recovery for such damages as appellant might have prevented in the exercise of reasonable care.

(Syllabus by the Court.)

Appeal from Municipal Court of Minneapolis; E. F. Waite, Judge.

Action by the Calender-Vanderhoof Company against the Chicago, Burlington & Quincy Railway Company. Verdict for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Young & Lightner, for appellant.

George C. Stiles, for respondent.

LEWIS, J. Respondent corporation, a commission firm in Minneapolis, was engaged in buying apples in the state of New York, and shipping them to Minneapolis in car load lots. November 13, 1904, respondent delivered a car load of apples at Hamlin, N. Y., to the New York Central & Hudson River Railroad Company, and because of shortage of barrels or inability to get a refrigerator car the apples were loaded in bulk in the two ends of an ordinary box freight car, held in place by bulkheads, and the space between the bulkheads was filled with 34 barrels of apples. In the course of transit the car was delivered to the connecting carrier, appellant company, at 11:55 p. m., November 18th, at its yard in Chicago. About two hours later, one of appellant's employees discovered the car, and testified that he found one of its doors off the runner so that it was open at the side and underneath sufficiently to enable him to put in his arm up to the elbow; that he felt the apples loose all around the door, and with the aid of his lantern could see, and also feel, that they were frozen. The car was permitted to remain on the track until 6:30 in the morning of November 19th when the apples were transferred to a refrigerator car, and sent on to Minneapolis. At the trial, respondent introduced evidence to show that the apples were in sound condition when shipped from Hamlin, N. Y., and upon delivery at Minneapolis were seriously damaged by being bruised and frostbitten, and this action was brought to recover the amount of the damage which was claimed to be \$289. The defenses pleaded and relied upon at the trial were that respondent could not recover in any event upon the ground that it was guilty of contributory negligence in shipping apples in a common box car at that season of the year; and further, that the apples were delivered to appellant company at Chicago in a damaged and frozen condition; that they were properly handled, and were not damaged while under its control. The court instructed the jury that the mere fact of packing the apples in bulk and shipping them in a box car instead of packing them in barrels or loading them in a refrigerator car, did not, in itself, constitute contributory

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negligence so as to constitute a complete defense. The court also instructed the jury that respondent, having shown by creditable evidence that the apples were in sound condition when shipped from New York, and in a damaged state when delivered at Minneapolis, the presumption was that they were delivered to appellant at its yard in Chicago in the same condition in which originally shipped, and that the damage occurred while the fruit was in its possession. A verdict was returned for respondent in the sum of \$224.

The court instructed the jury that the presumption above noted was for the jury to consider in determining the facts, and in determining the responsibility for the condition of the car when examined by appellant's agent in Chicago on the morning of November 19th; that such presumption was not conclusive but would yield to any reasonable evidence. To this extent the charge was correct. *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506, 31 Am. Rep. 353; *Beede v. Wis. Central Ry. Co.*, 90 Minn. 36, 95 N. W. 454, 101 Am. St. Rep. 390.

According to the evidence, the shipping of apples from New York to Minneapolis in an ordinary freight box car at that time of the year was unusual, owing to the liability of change in temperature, yet it seems to us that the mere fact of such packing and shipping does not, in itself, constitute contributory negligence so as to preclude recovering such damages as may have been caused by appellant. As already stated, appellant's agent, upon examining the car upon its track at about 1:30 a. m. November 19th, found the door partly open and apples on the floor among the barrels in a frozen condition. At 6:30 the same morning, a crew of men were set to work to transfer the apples to a refrigerator car, and several witnesses testify that portions of the bulkheads had broken at the top so that several bushels of apples had fallen down among the barrels and were more or less bruised and frozen; that the apples were transferred to the refrigerator car by means of baskets, and while it is not claimed that each particular apple was picked up separately, they were removed by hand, and were not handled roughly. The temperature was 14 degrees above zero during November 17th and 18th, and if the door was partially open during that time, frost must have made its impression on the apples at the time the car was discovered and inspected, as stated, and if portions of the bulkheads had broken down and some 20 bushels of apples had fallen among the barrels in the space between the doors, the car must have encountered rough treatment in its transit from Hamlin, New York to Chicago, and the apples must have been bruised to some extent. If the car was in the condition described by the witnesses of appellant, when found upon its tracks, then appellant was not required to resort to extraordinary or unusual means or expense to save the fruit. All it was required to do was to exercise reasonable care under the circumstances, and if it was not customary to ship apples in bulk in box cars at that season, then appellant was

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not required to anticipate that a car of perishable fruit, loaded in such manner, would be delivered upon its tracks for transportation at midnight at that time of the year. It was claimed at the trial by respondent that appellant should have taken immediate action, and resorted to some extraordinary means to take care of the fruit for the rest of the night; that it should either have transferred it at once to a proper car, or have taken the car to the roundhouse. The evidence discloses there was no fruit-house for such purpose, no roundhouse within three miles, and that there were neither engine nor men available for that purpose, or for the purpose of transferring the fruit to another car, and it does not appear what other steps appellant could have taken. In the early morning, as soon as workmen arrived, the fruit was transferred to the refrigerator car, and there is no evidence that any damage was occasioned thereafter.

We are strongly impressed with the effect of this evidence, and if true, in our opinion, appellant did all that could reasonably be required of it under the circumstances. The learned trial court submitted the case in an exhaustive charge, in the main, setting forth correct general principles of law, but was in error in directing the jury to take into consideration such extraordinary steps as above noted in determining whether appellant had exercised reasonable care. For this reason, a new trial should be granted.

So ordered.

PECOS N. T. RY. CO. et al. v. EVANS-SNYDER-BUEL CO.

(Supreme Court of Texas, Nov. 14, 1906.)

[97 S. W. Rep. 466.]

Carriers—Carriage of Live Stock—Claim for Damages.*—A provision of a shipping contract, requiring certain notice of any claim for damages for loss or injury to the stock shipped during the transportation, was not applicable to a claim for depreciation in the market value on account of a decline in the market during the time lost in delay in transportation.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the Evans-Snyder-Buel Company against the Pecos & Northern Texas Railway Company and others. The Court of Civil Appeals affirmed a judgment in favor of plaintiffs (93 S. W. 1024), and defendants bring error. Affirmed.

*For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Mumford v. Chicago, etc., Ry. Co.* (Iowa), 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S., 431; *Reynolds v. Great Northern Ry. Co.* (Wash.), 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

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J. W. Terry and Madden & Truelove, for plaintiffs in error.
Matlock, Müller & Dycus, for defendants in error.

WILLIAMS, J. This writ of error was granted because we thought there was error in the holding of the Court of Civil Appeals that the clause in the shipping contract requiring 91 days' notice of the plaintiffs' claim for damages, as a condition precedent to the right to sue therefor, was so connected with certain illegal stipulations in the same contract as to render all of them void; but an examination of the record results in the conclusion that those of the assignments of error in the briefs filed in the Court of Civil Appeals, which are renewed in the application for writ of error, so far as they relate to this question, do not make it decisive of the appeal. Those assignments are all based upon the refusal of the trial court to grant a new trial on the ground that the verdict was unsupported by evidence. The stipulation in question cannot sustain so broad a position, unless it be true that it necessarily defeats plaintiffs' entire claim for damages, or enough of it to render the verdict excessive. No other complaint is made of any ruling of the trial court concerning it, and, if the jury before whom it was admitted in evidence could have given it its full legal effect, and still have found the verdict they did consistently with the evidence, it cannot be said that their finding is unsupported. Briefly stated, the notice required was to be given of any claim for damages for "loss or injury to his said stock during transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof, for shipment."

The classes of damage submitted for investigation by the jury were three: (1) For depreciation in the condition of the cattle themselves from being held at the point of shipment before the execution of the written contract of which the stipulation is a part. (2) Additional injury resulting to the cattle from negligent delay in transportation. (3) Depreciation in the market value of the cattle on account of a decline in the market during the time lost in the delay in transportation. From this statement it is evident that the third class is not covered by the stipulation, because such damages could not in any just sense be considered as embraced in the language "loss or injury to his said stock." If it be conceded that both the other claims are within the terms employed, sufficient reason was set up by the pleading and evidence why it was not binding upon plaintiffs, at least, as to the first, which reason is that the cause of action to recover it had accrued and was complete before the written contract for the transportation of the cattle was executed, and that there was no consideration for any provision in the writing affecting that cause of action. The jury might well have found this to be true, if, indeed, consistently with the evidence, they could have found otherwise than that the portions of the written contract referred to were without consideration. The claims for damages thus

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taken out of the operation of the provision in question were sufficient to sustain the verdict, and hence the complaint that it is unsupported cannot be sustained.

The complaint that the evidence is insufficient to show an oral contract between the shippers and the Pecos & Northern Texas Railway Company, by which the latter agreed to furnish cars on a particular day, is also based only on assignments that the verdict is unsupported by evidence, which assignment would not be sustained if the fact were found to be as contended. The verdict might still be supported by the further fact which was alleged, and to show which evidence was introduced, that the railroad company negligently failed to furnish the cars within a reasonable time. No other question requiring notice is presented by the application.

Affirmed.

BUSSEY v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina, Sept. 6, 1906.)

[55 S. E. Rep. 163.]

Carriers—Refusal to Transport Passenger—Action—Pleading.—Where a complaint alleged that defendant willfully and recklessly failed and refused to furnish transportation, and that plaintiff was ejected from the train, and that such ejection was due to the unlawful, willful, and reckless conduct of defendant, the latter words refer to conduct other than the failure to transport.

Same—Evidence.—Where, in an action for failure to transport plaintiff, the complaint makes no reference to the defendant acting as agent in selling tickets over connecting lines, but defendant relies on that fact as a defense, plaintiff may show that the ticket sold was defective over such other lines.

Same—Defective Ticket.*—Where, in an action against a carrier for refusal to furnish transportation, the ticket sold showed on its face that it was intended to have coupons for several connecting lines, over which defendant sold it, attached to it so that plaintiff could go to a certain place and return, and defendant warranted the ticket to be good, the fact that the conductor over the connecting line passed it on the outgoing trip, does not bind such connecting line, so as to require another conductor on the same road to receive it on the return trip.

Appeal—Exceptions to Evidence—Review.—Exceptions to evidence will not be considered, where the objection stated no ground therefor, and where like evidence was admitted without objection.

Same—Harmless Error.—That the court admitted irrelevant evi-

*For the authorities in this series on the subject of the authority of the carrier's employees to waive the conditions of passenger tickets, see foot-notes appended to *Elliott v. Southern Pac. Co.* (Cal.), 18 R. R. R. 52, 41 Am. & Eng. R. Cas., N. S., 52.

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dence is no ground for reversal, where no abuse of discretion is shown.

Carriers—Sale of Defective Ticket—Evidence.—Where a carrier sold a ticket which showed on its face that it was intended to have coupons attached, and no such coupons were in fact attached, and there was testimony that defendant's conductor told plaintiff that a ticket, in the form in which it was, was not good, such facts were admissible to show recklessness and disregard of plaintiff's rights.

Negligence—Wantonness.†—Wantonness is properly defined as conscious failure to observe due care and intentional doing of an unlawful act, knowing such act to be unlawful.

Same—Recklessness.†—Recklessness in the equivalent of willfulness or intentional wrong.

Appeal from Common Pleas Circuit Court of Greenville County; Dantzler, Judge.

Action by Julia Emmie Bussey, by her guardian, against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The following are defendant's exceptions:

"1. Because, as it is respectfully submitted, the presiding judge erred in his rulings upon the testimony in the following particulars: (1) In allowing the plaintiff to testify that the defendant's conductor between Fountain Inn and Laurens, when he took up her ticket, told her that the form of it was not good, when such testimony was not in support of any allegation in the complaint, but was entirely outside of the issues made therein, and it was, therefore, incompetent. (2) In allowing the testimony just mentioned when, under the law, statements or admissions of this character by the defendant's conductor cannot bind the defendant, as there was no testimony that he had authority to so bind defendant, and the testimony was further incompetent on this ground. (3) In allowing the plaintiff to testify to conversations between her and one Richardson in the city of Louisville, and that the said party stated to her that her ticket was all right, in support of a claim for damages on the ground that such ticket was not a good ticket, when there was no such issue raised in the case, and such testimony was, therefore, incompetent. (4) In allowing the plaintiff to testify that the conductor on the Queen & Crescent Road said to her that the ticket she had was not a valid one, and was not worth the paper it was written on, in support of her claim for damages on the ground that she was not furnished a valid ticket, when there was no such allegation in the complaint and no such issue in the case, and when such conductor had no authority to bind defendant to such admission, and, therefore, such testimony was incompetent. (5) In allowing the plaintiff's counsel to ask the question of the defendant's witness, Aiken, and

†See foot-notes appended to *Montgomery St. Ry. v. Rice* (Ala.), 16 R. R. R. 499, 39 Am. & Eng. R. Cas., N. S., 499; extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

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requiring the same to be answered, as to whether or not the ticket in this case was valid or invalid, regular or irregular, and why the same was irregular, when there was no allegation in the complaint that the defendant had failed to furnish a good and valid ticket, and there was no such issue raised in the pleadings, and such testimony was, therefore, incompetent. (6) In allowing the plaintiff's counsel to ask the question of the defendant's witness, Aiken, and requiring the same to be answered, as to whether the ticket in this case was valid or invalid, regular or irregular, and why the same was irregular, when the answer to such question was a mere matter of opinion upon a legal question of the validity of such ticket, and for that further reason, such testimony was incompetent. (7) In allowing the plaintiff's counsel to ask the following question of the defendant's witness, Aiken, and requiring such witness to answer the same, to wit: 'Did you recognize that that ticket was binding upon your railroad?' when such question and the answer thereto was incompetent, for the reason that it was simply giving the opinion of the witness upon a matter of law, which should have been decided by the court. (8) In not allowing the witness, C. L. Townsend, to answer the following question, and in sustaining the plaintiff's objection thereto, namely: 'Did you think that was a good ticket when you sold it?' when such question and the answer thereto was competent in this case, being in support of the defense that there was not a particle of malice, or willfulness in the conduct of the said Townsend, as agent of the railway company, in issuing such ticket. (9) In allowing the plaintiff's counsel to ask the witness, Townsend, the question, and requiring him to answer it, 'Did you have any other tickets for sale at the time except this?' the error being that such testimony was incompetent, for that it tended to prove facts not alleged in the complaint, and it was, therefore, irrelevant. (10) In ruling that the testimony referred to in the ninth exception was competent on cross-examination, for the reason, as alleged by the court, that defendant's counsel had been allowed to ask the same witness in relation to the ticket, when, it is respectfully submitted, that the question referred to by the presiding judge had been ruled incompetent, and when, further, even if allowed, such ruling would not be a justification, for the reason that the question asked by defendant's counsel was merely for the purpose of showing that there was no willful issuing of an illegal or irregular ticket by the defendant.

"2. Because, as it is respectfully submitted, the presiding judge erred in refusing to grant the defendant's motion for a nonsuit at the close of the plaintiff's testimony, when such motion should have been granted on the following grounds, and it was error of law to refuse to do so: (1) There was absolutely no testimony tending to show any facts to go to the jury to entitle the plaintiff to punitive damages. (2) There being no testimony to go to the jury, upon which a verdict for punitive damages can stand, there was no issue for the jury at all, for the reason that the action was for punitive damages only, and hence, there could be no recovery

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of compensatory damages. (3) There was no testimony upon which the jury could render a verdict against the defendant, Charleston & Western Carolina Railway Co., for either punitive or compensatory damages, because the contract introduced in evidence showed that the Charleston & Western Carolina Railway Co. was not to be liable beyond its own lines. (4) Because the evidence showed that if there was any wrong done to the plaintiff, it was done by a railroad company other than the defendant Charleston & Western Carolina Railway Co.

"3. Because, as it is respectfully submitted, the presiding judge erred in holding on the motion made by the defendant at the close of plaintiff's testimony for a nonsuit, that such motion should not be granted because there was no evidence that the Queen & Crescent Railroad was a party to the contract evidenced by the ticket of the defendant Charleston & Western Carolina Railway Co., when the undisputed evidence on the part of the plaintiff showed that the ticket issued by the defendant had been recognized by the Queen & Crescent Railroad as a valid ticket, and that that company had allowed the plaintiff to ride on it on her trip to Louisville, Ky.

"4. Because, as it is respectfully submitted, the presiding judge erred in refusing to grant the defendant's motion for a nonsuit at the close of all the evidence in the case, and in not then holding that there was no evidence to go to the jury tending to show that the defendant, Charleston Western Carolina Railway Company, had been guilty of any willfulness or wantonness whatsoever towards the plaintiff, and in not therefore granting the defendant's motion for a nonsuit.

"5. Because, as it is respectfully submitted, the presiding judge erred in charging the jury as a matter of law that the defendant, in the ticket issued by it, guarantied the plaintiff transportation from Fountain Inn, S. C., to Louisville, Ky., and from Louisville, Ky., to Fountain Inn, S. C., when in such ticket the defendant did not make such guaranty for itself, but only as agent beyond its own lines.

"6. Because, as it is respectfully submitted, the presiding judge erred in charging the jury that the clause in the contract upon the face of the ticket in evidence, reading as follows: '(10) Responsibility, in selling this reduced rate ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and it is not responsible beyond its own line'—could not bind the plaintiff, unless the lines over which she was to pass were attached to and made a part of the contract, or unless she had knowledge of the lines over which she was to pass, when, we submit, under the law, the plaintiff was bound by such stipulation, whether the lines over which she was to pass were or were not mentioned in the ticket, and whether she did or did not know what such lines were to be.

"7. Because, as it is respectfully submitted, the presiding judge erred in refusing to charge the jury in the language of the defendant's third request, as follows: 'The complaint does not

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allege willfulness or wantonness in the matter of furnishing a ticket to the plaintiff, and, therefore, there can be no recovery for any act of the defendant or any of its agents, in or about the furnishing of a proper ticket, or the failure to do so—when, we submit, under the law, the defendant was entitled to have this instruction given to the jury, as the plaintiff had not alleged in her complaint against the defendant any negligence in failing to furnish a proper ticket, but, on the contrary, had alleged that the defendant furnished to the plaintiff a first-class round trip ticket, which carried her safely from Fountain Inn to Louisville, and when her right to recovery was based entirely upon the alleged willfulness of the Charleston & Western Carolina Railway Co. in ejecting the plaintiff from a train on the Queen & Crescent Road on her return trip.

“8. Because, as it is respectfully submitted, the presiding judge erred in his instruction to the jury in defining wantonness, to be where one consciously fails to observe due care, when we submit that such definition was erroneous in law, and tended to prejudice the rights of the defendant.

“9. Because, as it is respectfully submitted, the presiding judge erred as a matter of law in refusing to grant a new trial on the first ground upon which motion for new trial was based, to wit: Because there was no evidence showing or tending to show that any agent of the defendant railway company had committed a wrong toward the plaintiff, knowing it was a wrong.

“10. Because the presiding judge erred as a matter of law in not granting a new trial on the second ground upon which motion therefor was based, to wit: Because the verdict was contrary to the charge of the court. The jury was instructed that unless they found from the preponderance of the evidence that some agent or agents of the railway company did a wrong to the plaintiff, knowing it was a wrong, they could not find in favor of the plaintiff. There was not a title of evidence that any such wrong was committed, and, therefore, the failure to grant a new trial was error of law.

“11. Because the presiding judge erred as a matter of law in refusing to grant a new trial on the third ground upon which the motion was based, namely: That there was absolutely no evidence tending to show that there was any willfulness on the part of the defendant or its agents in the particulars stated in the complaint, and to allow a verdict to stand which was based upon willful acts not alleged in the complaint, was error of law.

“12. Because the presiding judge erred in not granting a new trial on the fourth ground upon which motion therefor was based, namely: That the agent of the defendant committed no wrong toward the plaintiff knowingly, and showing, further, that the only damage or injury sustained by the plaintiff was a delay of one day, and a verdict for \$2,500 was excessive, and we submit the failure to set it aside was error of law.”

S. J. Simpson and M. F. Ansel, for appellant.
McCullough & McSwain, for respondent.

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GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff, through intentional wrong on the part of the defendant. The allegations of the complaint material to the questions involved, are substantially as follows: "(1) That on the 12th of June, 1905, the plaintiff applied to defendant's agent at Fountain Inn, S. C., for transportation to Louisville, Ky., and return, paid the agent the fare demanded for the ticket, and the agent delivered to her a round-trip ticket for one first-class passage and return, from Fountain Inn to Louisville, Ky., via Spartanburg, S. C. (2) That on the said day, plaintiff boarded one of defendant's trains, and was carried to Louisville; after arriving there, she applied to Jas. Richardson, special agent of the defendant, as directed by it, for an extension of her ticket, until the 10th of July, 1905, which request was granted. (3) That she complied with all the requirements and conditions of the defendant, with reference to said transportation, and the defendant unlawfully, carelessly, recklessly, willfully and wantonly failed and refused to furnish to her transportation to Fountain Inn from Louisville, and on the 10th of July, 1905, she was ejected from the train upon which she was traveling, and which was a train on the same road over which she traveled in going to Louisville, which ejection was due to the unlawful, willful, wanton and reckless conduct of the defendant. (4) That plaintiff was ejected at Danville, Ky.; she was an utter stranger in the town, did not have but \$2 on her person, nor was there any one to whom she could appeal for relief; in her humiliated and deplorable condition, she telephoned to a relative at a distance, who advanced money enough to pay her hotel bill, and to buy another ticket home, where she arrived on the 13th of July, 1905."

The defendant denied the material allegations of the complaint, and alleged: "That the contract between plaintiff and defendant was, that the defendant, in selling said reduced rate return ticket, for passage over other lines than his own, acted only as agent, and is not responsible beyond its own line, said ticket having the following conditions attached to the same, which was duly accepted and agreed to by the plaintiff herein, to wit: '10. Responsibility. In selling this reduced rate ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and is not responsible beyond its own line.' That Danville, Ky., is not upon the line of road belonging to this defendant, nor operated by it."

The jury rendered a verdict in favor of the plaintiff for \$2,500, and the defendant appealed upon exceptions, which will be set out in the report of the case. Before proceeding to consider the exceptions, it will be necessary to determine what issues are raised by the pleadings.

1. The complaint alleges that the plaintiff applied to the defendant's agent for transportation to Louisville, Ky., and return, and paid to the agent the fare demanded for said ticket. The third paragraph of the complaint not only alleges that the defendant

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willfully and recklessly failed and refused to furnish transportation, and that the plaintiff was ejected from the train, but also that said ejection was due to the unlawful, willful, wanton, and reckless conduct of the defendant. Unless the last-mentioned words refer to conduct other than failure to transport, then they are without force and effect, as that allegation had already been made. Pleadings under the Code are to be liberally construed, with a view to substantial justice between the parties, and, if possible, effect should be given to all the language of the complaint, instead of a part only. We are constrained, therefore, to rule that the word "conduct" did not have reference solely to the failure to furnish transportation.

2. The complaint makes no reference whatever to the fact that the defendant was only acting as agent, in selling the ticket over connecting lines; but the defendant relies upon this fact in its answer. The plaintiff had the right to offer testimony for the purpose of showing that the ticket was vitally defective over connecting lines, as this fact would render ineffectual the defense set up in answer. It was only incumbent upon the plaintiff, in the first instance, to introduce testimony tending to sustain the allegations of the complaint, in order to make out a *prima facie* case.

3. Before proceeding to consider the specific assignments of error, we deem it advisable to state our construction of the contract. The ticket was composed of two parts, which, evidently, were not intended to be attached together for general use, as they contained inconsistent provisions. The heading or red part of the ticket states the following conditions: "Good subject to conditions printed below for one first class passage to Louisville, Ky., and return, *via route designated in coupons attached.*" "This ticket if presented by any other than the person named hereon, shall be forfeited, and any agent or conductor of any line over which it *reads*, shall have the right to take up and cancel the entire ticket." "The holder of this ticket agrees, that the liability of the lines, over which this ticket *reads*, shall be," etc. "This ticket is subject to the rules and regulations of each line, over which it reads." "No agent nor employee of *any line* has power to alter, modify or waive any of the conditions named in this contract." "In selling this reduced rate ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and is not responsible beyond its own line." (All the italics ours.) The only coupons attached are in the blue part of the ticket and are as follows: "Charleston and Western Carolina Ry." "Round Trip Party Ticket—Going Coupon." "Good for 1st class passage 1 person as punched in margin of return coupon, from Fountain Inn, S. C., to Louisville, Ky., via Spartanburg." The return coupon is similar, except the starting point and destination are reversed. The words "*via route designated in coupons attached*" clearly show that the heading or red part of the ticket was intended to be attached to the coupons, designating the route over the connecting lines, and that the ticket was

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defective in form. (E. N. Aiken, traveling passenger agent of the Queen & Crescent Road, a witness for the defendant, testified that it is the universal rule to exchange coupon tickets with any road, that is financially sound; and that the plaintiff was ejected because her ticket was irregular. The other words italicized also show that coupons designating the route over connecting lines were contemplated so as to make the ticket complete. The words, "no agent nor employee of any line has power to alter, modify, or waive any of the conditions named in this contract," are important, as they manifest an intention on the part of the defendant to reserve the right to designate the route over the connecting lines, in the ticket itself, and to prevent a connecting line from recognizing the ticket unless it was mentioned in a coupon attached, and then setting up the claim that the ticket was sold over its line, and that the defendant acted as its agent in such sale. A conductor, therefore, on a connecting line, did not have the right to interpolate into the ticket provisions that would make it apply to his line, and he was not bound to receive it in its vitally defective form. The words, "in selling this reduced rate ticket for passage over other lines, this company acts only as agent, and is not responsible beyond its own line," must be construed in connection with the other provisions of the ticket, when it will be seen that "other lines" mean other lines mentioned in coupons attached. When the defendant sold the ticket, there was an implied agreement that it had made arrangements with connecting lines to accept the ticket in the form in which it was sold. In other words, it warranted the ticket to be good in form, for one first class passage from Fountain Inn to Louisville, Ky., and return, not only over its own but connecting lines. The appellant's attorneys seem to recognize this principle, for in their argument they say: "She might have complained, if, on the going trip, she had been unable to ascertain the route she was to take, and on one of the defendant's connections had been willing to recognize her ticket, as a legal contract on its behalf." They, however, contend that there was no failure in this respect; that as her ticket was recognized from Fountain Inn to Louisville, there was no ground for such complaint; and that the Queen & Crescent Road, having once recognized her ticket, it was legally bound to recognize it on her return trip. This view cannot be sustained, for the reason that the failure of one conductor to discharge his duty to eject a person attempting to ride upon a fatally defective ticket, would not bind the company, to the extent of preventing another of its conductors on a different train and at another time, from refusing to recognize the said ticket.

We now proceed to consider the exceptions in their regular order:

First exception: All the particulars in which error is assigned, except the eighth, must be overruled, for the reason, either that the grounds of objection to the introduction of the testimony were not specified, or testimony to the same effect was afterwards

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introduced without objection, or the testimony was irrelevant. The introduction of irrelevant testimony must be left, in large measure, to the discretion of the presiding judge, and his rulings are not appealable, unless there was an abuse of discretion, which does not appear in this case. The eighth specification of error mentioned in said exception cannot be sustained, because the witness afterwards answered the question in the affirmative.

Second exception: The very irregular form of the ticket, especially under the circumstances of this case, and the conduct of the validating agent, after being notified that the plaintiff had been warned that her ticket was defective, tended to show recklessness and a disregard of the plaintiff's rights.

Third exception: This exception has been disposed of by what has been already said.

Fourth exception: The question presented by this exception has been disposed of.

Fifth exception: The language of the presiding judge, mentioned in this exception, forms only a part of his charge on the subject, and was explained and qualified by the words immediately following said language, in which he referred to the tenth clause of the ticket set out in the answer. But without the qualification, the charge was in conformity with our construction of the contract.

Sixth exception: While this charge was erroneous, it was not prejudicial, under our construction of the contract.

Seventh exception: This exception is disposed of by what was said in determining what issues were raised by the pleadings.

Eight exception: This exception seems to have been abandoned, as it is not discussed by the appellant's attorneys in their argument. It forms only part of the sentence, which is as follows: "Wantonness is a conscious failure to observe due care, a conscious invasion of the rights of another, an intentional doing of an unlawful act, knowing such act to have been unlawful." It is not necessary to cite authorities to show that the exception, even if it has not been abandoned, cannot be sustained.

Ninth, tenth, eleventh, and twelfth exceptions: These exceptions must be overruled for the reason that we have already shown there was testimony tending to prove recklessness, which is the equivalent of willfulness or intentional wrong. *Pickett v. Railway*, 69 S. C. 445, 48 S. E. 466.

It is the judgment of this court that the judgment of the circuit court be affirmed.

SOUTHERN RY. CO. *v.* HANSBROUGH'S ADM'X.

(Supreme Court of Appeals of Virginia, June 14, 1906.)

[54 S. E. Rep. 17.]

Railroads—Injury to Person on Track—Pleading—Declarations—Sufficiency.*—A declaration, in an action against a railway company for injuries to a traveler in a collision with an engine operated on a street, which alleges that the engine was running at a high rate of speed, carelessly, negligently, and unskillfully, without pointing out in what manner it was so run, and without alleging a violation of any ordinance, or averring any obstruction to the view of persons crossing the track, which made it necessary for the company not to run its engines at a high rate of speed, states no cause of action, because it fails to point out in what manner the company was negligent and to show what duty it owed to the traveler which it neglected to perform.

Same.*—A declaration, in an action against a railway company for injuries to a traveler in a collision with an engine operated on a street, which alleges that it was the duty of the company to run its engine at 5 miles an hour, and that it ran the same at 40 miles an hour, without alleging the violation of any ordinance or statute, and which alleges that the bell was not rung without alleging any ordinance or statute requiring the ringing of the bell, and without charging the company with any failure to exercise caution to prevent injury after seeing the traveler, states no cause of action, because it fails to state facts showing any duty on the part of the company.

Same.*—A declaration, in an action against a railroad company for injuries to a traveler in a collision with an engine operated on a street, which sets out the ordinance making it unlawful for trains to be run at a greater speed than 5 miles per hour, and requiring every locomotive to be furnished with a bell, which shall be rung during the time the locomotive is in motion, and which alleges a violation of the ordinance as the proximate cause of the injury, sets out facts sufficient to inform the company of the existence of the duty which it is claimed was neglected, and which negligence caused the injury complained of.

Error to Circuit Court of City of Alexandria.

Action by Hansbrough's administratrix against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. C. Carlin, for appellants.

Norton & Boothe, for appellee.

*See preceding case, and foot-notes.

For definitions of negligence, see extensive note, 17 R. R. R. 236, 49 Am. & Eng. R. Cas., N. S., 236; *Ellington v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 174, 42 Am. & Eng. R. Cas., N. S., 174; foot-notes appended to *German Ins. Co. v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

Southern Ry. Co. v. Hansbrough's Adm'r

CARDWELL, J. This is a writ of error to a judgment of the circuit court of the city of Alexandria for damages for the death of defendant in error's intestate, alleged to have been caused by the negligence of the plaintiff in error.

There was a demurrer to the declaration as a whole, and to each count thereof, which was overruled; and this ruling of the trial court is assigned as error.

The first count of the declaration, after setting out that the defendant was the owner and operator of a certain line of railroad by means of locomotive steam engines, cars, and trains within the municipal corporation of the city of Alexandria, and in connection with its railroad and work on the day named was operating its railroad in and upon a certain public street and highway in said city known as "Henry street," and extending along and upon said public street and highway from and beyond the northern terminus of said city and through the said city along Henry street, southwardly, intersecting and crossing divers public streets and highways in said city, amongst them Madison street, then and there a public highway for persons with horses, carriages, and vehicles to travel and pass along, upon, and over the same, and while the defendant was using the said street for the operation of its railroad trains the plaintiff's intestate was, on the day named, driving a horse attached to a wagon filled with boxes containing glass, in which wagon the plaintiff's intestate was then and there seated, along and upon Madison street towards Henry street from the west, and at and near to the intersection of the said Henry and Madison streets, at a slow, proper, and lawful rate of speed, and was about to cross Henry street to his destination, but before he could cross said Henry street a certain locomotive engine, without any train attached thereto, moving towards and upon said Madison street, at its intersection with Henry street, at a high and rapid rate of speed (giving the number of the engine and the name of the engineer in charge thereof), was run and propelled by the defendant, its agent, and employee aforesaid carelessly, negligently, and unskillfully, with great rapidity, and with great force and violence upon and against the said plaintiff's intestate, and upon and against the said horse and wagon, killing the said horse and wrecking and destroying the wagon, and with great force and violence struck the said plaintiff's intestate, and so grievously wounded him that the said plaintiff's intestate immediately died therefrom, etc.

It appears, therefore, that this count does not specify in what way the defendant was negligent. It merely charges that it was running its engine at a high rate of speed, carelessly, negligently, and unskillfully, but it does not point out in what manner the defendant was negligent or careless, nor in what manner its engine was unskillfully run, nor does it allege violation of any ordinance or aver any obstruction to the view of persons crossing its railroad at the place named which made it necessary and proper for

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the defendant not to run its engines and trains at that point at which would make the running of an engine or train at a particular point at a high rate of speed negligence, but this count of the declaration does not show such a state of facts and circumstances as constitute the existence of any duty on the part of the defendant, but uses simply, in addition to the charge that the defendant ran its locomotive engine at a high and rapid rate of speed, the general expression that the engine was "carelessly, negligently and unskillfully run, and propelled with great rapidity, and with great force and violence upon the plaintiff's intestate." This we think is wholly insufficient as pointing out in what manner the defendant was negligent, and fails to show what duty was owing from the defendant to the party injured which it is claimed had been neglected, and the neglect of which caused the plaintiff's intestate's injury. *Hortenstein v. Va.-Car. Ry. Co.*, 102 Va. 914, 47 S. E. 996. It was therefore error to overrule the demurrer to this count.

The second and third counts are the same as the first except that the second, without alleging the violation of any ordinance or statute, alleges that it was the duty of the defendant to run at 5 miles an hour, and that it in fact was running at 40 miles an hour; and the third count, without alleging that any ordinance or statute required the ringing of the bell on the engine in question, charges that the bell was not ringing. The allegation that it was the duty of the defendant to run its engine at 5 miles an hour and that it was run at 40 miles an hour, and that it was not ringing its bell, without alleging the violation of some ordinance or statute making it the duty of defendant to run its engine in question at 5 miles an hour and requiring the ringing of the bell on the engine, does not show such a state of facts or circumstances as would constitute the existence of any duty on the part of the defendant. The mere fact that a train was run at an unlawful rate of speed and was not ringing the bell does not obscure the vision, and the only duty that the owner and operator of a train would owe to a person upon its track, or crossing its track, would be to use all means in its power to prevent injuring him after observing that he was not going to get off the track over which he was crossing. There is no allegation in either the second or third count charging the defendant with any failure to exercise caution to prevent injuring the plaintiff's intestate after seeing him, nor is there any allegation that the defendant's engine man at any time saw the plaintiff's intestate until the actual moment of the collision. Therefore we do not think that either of these counts sufficiently charges a duty owing by the defendant to the plaintiff's intestate, the neglect of which caused the injury complained of, and the demurrer thereto should have been sustained. *Washington, etc., Ry. Co. v. Lacey*, 94 Va. 475, 26 S. E. 834; *Southern Ry. Co. v. Cooper*, 98 Va. 306, 36 S. E. 388; *Humphrey v. Valley R. Co.*, 100 Va. 762, 42 S. E. 882; *Southern Ry. Co. v. Bruce*, 97 Va. 92, 33 S. E. 548; *N. W. Ry. Co. v.*

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Wilson, 90 Va. 263, 18 S. E. 35; Hogan's Adm'r *v.* Tyler, 90 Va. 19, 17 S. E. 723; Marks' Adm'r *v.* P. R. Co., 88 Va. 1, 13 S. E. 299; Seaboard, etc., Ry. Co. *v.* Joyner's Adm'r, 92 Va. 354, 23 S. E. 773; Wood's Case, 99 Va. 156, 37 S. E. 846; Hortenstein *v.* Va.-Car. Ry. Co., *supra*.

The fourth count repeats the averments of the three preceding counts, and sets out in full the ordinance in force in the city of Alexandria making it unlawful for an engine, cars, etc., to be drawn, run, or propelled at a greater rate of speed than 5 miles per hour, and requiring every locomotive run within the city to be furnished with a bell of not less than 30 pounds in weight, that should be rung during the time the locomotive is in motion within the limits of the city, and charges the violation of this ordinance as the proximate cause of the injury to plaintiff's intestate. Here the declaration sets out facts and circumstances sufficient to inform the defendant of the existence of the duty which it is claimed was neglected and which neglect caused the injury complained of. In other words, this count of the declaration states sufficient facts to enable the court to say upon demurrer whether, if the facts stated are proved, the plaintiff would be entitled to recover, and measures up to the rule recently laid down by this court in *Hortenstein v. Va.-Car. Ry. Co.*, *supra*. See, also, *Railway Co. v. Cooper*, *supra*; *Shearman & Red.* on Neg. § 467. There was no error, therefore, in the ruling of the trial court on the demurrer as to the fourth count in the declaration.

For the error, however, in overruling the demurrer to the first, second, and third counts, the judgment complained of must be reversed and annulled, and the cause will be remanded to the court below, to be further proceeded with in accordance with the views herein expressed.

CRABTREE v. WASHINGTON COUNTY RY. CO.
(Supreme Judicial Court of Maine, July 17, 1906.)

[64 Atl. Rep. 842.]

Carriers—Excursion Tickets—Limitation of Use—Construction.—Rev. St., c. 52, § 2, provides as follows: "No railroad company shall limit the right of a ticket holder to any given train, but such ticket holder may travel on any train, whether regular or express, and may stop at any of the stations along the line of the road at which such trains stop; and such ticket shall be good for a passage as above for six years from the day it was first issued; provided, that railroad companies may sell excursion, return or other special tickets at less than the regular rates of fare, to be used only as provided on the ticket."

The defendant sold to the plaintiff an excursion ticket from Eastport to Machias and return for about one-fourth of the regular fare

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from Eastport to Machias and return, of the following tenor: "Washington County Railway Excursion Ticket. Eastport to Machias and return. This ticket is good only on continuous trains, and not good to stop off." The plaintiff rode on the defendant's train to Machias on the same day the ticket was issued to him, staid overnight, and on the morning of the next day he boarded a regular train to return to Eastport, and tendered the aforesaid ticket for his passage. The conductor refused to accept the same, and the plaintiff, upon his refusal to pay other fare, was ejected from the train. Held, that under the provisions of the aforesaid statute the only limitation of the use of this ticket "provided on the ticket" was that it should be "good only on continuous trains, and not good to stop off," and that the plaintiff had a right to a ride on any regular train from Machias to Eastport, within six years from the date of the ticket provided he made a continuous passage.

Same—Conditions on Ticket.—It was undoubtedly the intention of the Legislature by the enactment of the aforesaid statute to require railroad companies to state "on the ticket" all the limitations of its use other than the six-year limitation imposed by the statute.

Same—Advertisements—Effect.*—The plaintiff's use of the ticket was in no way modified by any provisions in posters or advertisements issued by the defendant, that were not "provided on the ticket," even though he had knowledge of such provisions. And evidence of such knowledge is inadmissible as the ticket itself is the only competent evidence of the contract between the plaintiff and the defendant.

Agreed statement from Supreme Judicial Court, Washington County.

Action by Ivory H. Crabtree against Washington County Railway Company, on an agreed statement of facts. Judgment for plaintiff.

Action on the case to recover damages for the alleged unlawful ejection of the plaintiff from the defendant's train on which he was a passenger.

The action came on for trial at the October term, 1905, of the Supreme Judicial Court, Washington county, at which time the parties filed an agreed statement of facts and on this agreed statement the case was sent to the law court with the following stipulations: "Upon such of the foregoing facts as are legally admissible, the court shall render judgment on law and facts, and if for plaintiff the damages assessed shall be \$20."

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, POWERS, and SPEAR, JJ.

William R. Pattangall, for plaintiff.

Curran & Curran, for defendant.

*See generally, foot-notes appended to *Freeman v. Atchison*, etc., Ry. Co. (Kan.), 18 R. R. R. 607, 41 Am. & Eng. R. Cas., N. S., 607. For the authorities in this series on the question whether the ticket is exclusive evidence of the contract between the passenger and the carrier, see foot-notes appended to *Cincinnati*, etc., Ry. Co. v. *Harris* (Tenn.), 19 R. R. R. 762, 42 Am. & Eng. R. Cas., N. S., 762.

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SPEAR, J. This case comes up on an agreed statement of facts. The Washington County Railway, the defendant, advertised an excursion from Eastport to Machias and return by posting handbills containing the following announcement:

"Washington County Railway. The All Rail Line. Every one in Eastport will be at Machias Wednesday, March 22nd, 1905, to root for the 'Lobsters.' Fare, Eastport to Machias 75 cents and return. Good going on regular trains and for return on the Lobsters' special."

The defendant caused to be inserted in the Eastport Sentinel, a newspaper published at Eastport on the 22d day of March, a somewhat more extended notice.

The agreed statement also shows that the plaintiff purchased for 75 cents, a sum of about one-fourth of the regular fare from Eastport to Machias, and return, a ticket for this excursion similar to the following copy:

"Washington County Railway excursion ticket, Eastport to Machias and return. This ticket is sold for less than regular fare and is good only on continuous trains, and not good to stop off."

The plaintiff traveled upon this ticket to Machias on the regular train of the defendant the night of the 22d day of March aforesaid, and after the basketball game advertised, went with the other excursionists to the defendant's station at Machias for the purpose of boarding the special train there to return to Eastport. The special train was the "Lobsters' Special" so-called, and was made up for the return of the excursionists to Eastport, leaving Machias at about 20 minutes after 12 o'clock a. m. on the 23d day of March A. D. 1905, and was the only train other than the regular train leaving Machias on the night of the 22d, or the morning of the 23d. The plaintiff being unable to obtain a seat owing to the crowded condition of the train stayed in Machias overnight, but on the morning of the 23d day of March boarded a regular train of the defendant to go to Eastport. He tendered for his passage his aforesaid ticket, and was told by the conductor that it was no good on that train. Upon the plaintiff's refusal to tender other fare, he was ejected from the train at a regular station without unreasonable or unnecessary force.

Upon such of the foregoing facts as are legally admissible, the court shall render judgment on law and facts, and if for plaintiff the damages assessed shall be \$20.

Upon this statement, the plaintiff seeks to recover against the railroad company for its refusal to transport him upon the ticket in question. His right of recovery depends upon determining whether the ticket he offered was a valid contract between him and the railroad company upon which he was, at that time, entitled to a passage from Machias to Eastport.

Our statute declares: "No railroad company shall limit the right of a ticket holder to any given train, but such ticket holder may travel on any train, whether regular or express, and may stop at any of the stations along the line of the road at which

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such trains stop; and such ticket shall be good for a passage as above for six years from the day it was first issued; provided that railroad companies may sell excursion, return, or other special tickets at less than the regular rates of fare, to be used only as provided on the ticket." Rev. St. c. 52, § 2. This proviso settles the case at bar. It was undoubtedly the intention of the Legislature by this enactment to require railroad companies to state "on the ticket" all the limitations of its use other than that imposed by the statute, viz, the six-year limitation.

In this case the only limitation of its use "provided on the ticket" was that it should be "good only on continuous trains, and not good to stop off." The statute having prohibited any other limitation except the six-year limit, we are unable to see that the plaintiff's use of the ticket he had purchased was in any way modified by any provisions in posters or advertisements that were not "provided on the ticket," even though he had knowledge of them. Evidence of such knowledge is inadmissible as the ticket itself is the only competent evidence of the contract between the plaintiff and defendant. Prior to the enactment of the statute, the ticket did not necessarily bear evidence, upon its face of all the terms of the contract. *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Crosby v. Maine Central R. Co.*, 69 Me. 418. But the statute containing the above proviso was enacted subsequent to the promulgation of each of the above cases, and must be presumed to have considered with reference to them, and to negative the conclusions therein deduced. The plaintiff had a right to a ride on any regular train from Machias to Eastport, within six years from the date of his ticket, provided, when he had once taken a train he made a continuous passage.

In accordance with the stipulation in the report the entry must be:

Judgment for the plaintiff for \$20, and costs.

HAYMAN *v.* PHILADELPHIA & R. CO.

(Supreme Court of Pennsylvania, March 19, 1906.)

[63 Atl. Rep. 967.]

Railroads—Injuries to Licensee.—Act April 4, 1868 (P. L. 58), § 1. providing that when any person shall sustain personal injury or loss of life while employed about the roads or premises of a railroad company, or on any train or car therein of which company such person is not an employee, the right of action against the company shall be the same as would exist if such person were an employee, provided that this section shall not apply to passengers, includes two classes of cases—one where the place of accident was for general purposes the premises of the railroad, and the person injured is lawfully engaged or employed on or about them, and is not a passenger; and the

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other where a person is on or about any train or car therein, in which case the nature of the employment at which the party was injured at the time becomes material, and, if the work has no relation to railroad work, the case is not within the statute.

Same.*—Plaintiff, a carpenter, was employed in a locomotive works and engaged in loading an engine on cars belonging to defendant railroad. The car stood on a track and was drawn by an engine to defendant's main tracks. Plaintiff did not know that the cars were to be moved before the loading was finished, but continued on the work after they were on the main track, and while walking on the track back to the works was struck by the engine. Held to be within Act April 4, 1868 (P. L. 58), § 1, in that the premises on which plaintiff was injured were those of defendant within the meaning of the act, and plaintiff must be considered a quasi employee at the time of the accident.

Mestrezat, Potter, and Elkin, JJ., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William Hayman against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Gavin W. Hart, for appellant.

Henry W. Scarborough, for appellee.

FELL, J. The controlling question in this case is whether the facts developed at the trial bring the plaintiff within section 1 of the act of April 4, 1868 (P. L. 58). The section is as follows: "When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots or premises of a railroad company, or on or about any train or car therein or thereon, of which company said person is not an employee, the right of action and recovery in all such cases against the company shall be such as would exist if such person were an employee, provided that this section shall not apply to passengers." The plaintiff was employed as a carpenter at the Baldwin Locomotive Works, and on the day of the ac-

*For the authorities in this series on the question, what is, and is not railroad work, within the meaning of employers, liability acts, see foot-notes appended to *Jemming v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 697, 42 Am. & Eng. R. Cas., N. S., 697.

For the authorities in this series on the question, who are, and are not the employees of a railroad company, see foot-notes appended to *Norfolk & W. Ry. Co. v. Bell* (Va.), 19 R. R. R. 263, 42 Am. & Eng. R. Cas., N. S., 263; foot-notes appended to *Chicago, etc., Ry. Co. v. Hamler* (Ill.), 19 R. R. R. 252, 42 Am. & Eng. R. Cas., N. S., 252; *Chicago, etc., R. Co. v. Weber* (Ill.), 19 R. R. R. 34, 42 Am. & Eng. R. Cas., N. S., 34; *Weisser v. Southern Pac. Ry. Co.* (Cal.), 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861; *Baker's Adm'r v. Lexington & E. R. Co.* (Ky.), 20 R. R. R. 223, 43 Am. & Eng. R. Cas., N. S., 223.

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cident he was engaged with other workmen in loading an engine on two gondola cars, the property of the defendant, which stood on a track in the Baldwin Works. His work was to secure in place the parts of the engine by means of wooden blocks so that they would not be disturbed by the motion of the car. Before this work was finished the cars were drawn by an engine of the defendant from the Baldwin Works down an incline to the main tracks and left standing there. The plaintiff did not know the cars were to be moved before the loading was finished. He continued at his work as they were taken down the incline and for 20 minutes after they were on the defendant's roadbed, when he went back to the Baldwin Works to get a piece of wood. While walking up the incline he was struck by an engine.

The learned trial judge in an opinion overruling the defendant's motion for judgment non obstante verdicto very clearly states the point on which the case turns, and says: "If the fact that Hayman was brought involuntarily to the point from which he was departing when the accident befell him were not in the case, we would have no doubt that he would stand in the first of the two classes of those to whom the act of 1868 applies, provided that the place of the accident is clearly and for general purposes part of 'the road, works, depots, or premises of the railroad company.'" The incline, whether on the property of the defendant or of the Baldwin Works, was a part of the premises of the defendant within the meaning of the act of 1868 if at the time it was being used for railroad business; and the plaintiff must be considered as a quasi employee if at the time of the accident he was engaged in doing work ordinarily done by railroad employees. In *Mulherrin v. Delaware, etc., Railroad Co.*, 81 Pa. 366, it was held that a railroad track which the defendant had a right to use in common with the company that owned it, was a part of the premises of the defendant company. It was said in the opinion: "The fact that the defendants were only entitled to track rights to the road is not material. This is not a question of the extent of their title. It was the road of the defendants for the purpose of moving their trains, which is sufficient to bring the case within the act of 1868." In *Cummings v. Pittsburgh, etc., Railroad Co.*, 92 Pa. 82, the plaintiff was employed by a coal dealer and was engaged in unloading cars standing on a siding constructed on his land. In *Stone v. Penna. Railroad Co.*, 132 Pa. 206, 19 Atl. 67, the yard foreman of a refining company was injured while separating a train of cars upon a siding in the yard of a refinery. In *Weaver v. Phila. & Reading Ry. Co.*, 202 Pa. 620, 52 Atl. 30, an employee of an iron company was injured while unloading a car on a siding owned by the iron company, and in *Laporte v. Pittsburg, etc., Railroad Co.*, 209 Pa. 469, 58 Atl. 860, an employee of a coke company was shifting cars on its tracks by gravity and was injured by reason of a switch having been left open. In all of these cases the plaintiffs were held to be within the meaning of the act of 1868.

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The distinction that divides the cases into two classes was pointed out by the present Chief Justice in *Spisak v. B. & O. Railroad Co.*, 152 Pa. 281, 25 Atl. 497. The first class includes those cases where the place of accident was for general purposes the premises of the railroad company. In such cases the person injured is within the act if he is "lawfully engaged or employed on or about" them and is not a passenger. "The other class is where the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the railroad company. In this class the nature of the employment at which the party injured was engaged at the time, becomes material. If it is a business connected with the railroad in the sense that it is ordinarily the duty of railroad employees, then while the party is engaged at it the statute treats him as a quasi employee, and puts his right upon the same basis. If, however, the work has no relation to railroad as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all." The plaintiff in this case was employed in loading an engine on the defendant's cars. Securing the pieces of the engine in place was as much a part of this work as was placing them on the cars. It was an essential part of the loading. In all cases where the question has arisen, the loading and unloading of cars has been considered as railroad work, and had the plaintiff been injured while so engaged in the Baldwin Works he would have been within the act.

Does the fact that the plaintiff while at work was carried from the premises of his employer to the roadbed of the railroad company alter the case? In *Kirby v. Penna. Railroad Co.*, 76 Pa. 506, the first case that arose under the act and in which its constitutionality was affirmed, it was said that the person to be affected by the act must be in or about the road voluntarily to perform some act or business connected with the road or its works, and being there "he knowingly assumes a relation regulated by the law and thus places himself under the operation of the law that governs the relation. He is not bound to assume the relation and when he does he acts with his eyes open." The plaintiff voluntarily assumed the relation in loading the car in the Baldwin Works, and he voluntarily continued it by remaining at the work after the car had been removed. He was as free to leave the car after it had stopped as he would have been to decline going with it if he had been consulted. If he had refused to continue the risk, and had been injured when returning from the place where he had been carried against his will, a different question would be presented. We see no ground for a valid distinction between the case of a plaintiff who voluntarily goes to a place of danger and one who voluntarily remains in such a place when there is nothing to prevent his leaving it.

The judgment is reversed, and judgment is now entered for the defendant on the question reserved, non obstante veredicto.

MESTREZAT, POTTER, and ELKIN, JJ., dissent.

ALABAMA & V. RY. CO. *et al.* v. HARZ.

(Supreme Court of Mississippi, Nov. 19, 1906.)

[42 So. Rep. 201.]

Master and Servant—Injuries to Third Persons—Torts—Liability of Master.*—Where a stenographer and the chief clerk in the office of a railway company had a dispute relative to the employer's business, after which the clerk procured the discharge of the stenographer, and three days later met him on the platform of the railway company and assaulted and struck him, the railway company was not liable in an action for damages.

Appeal and Error—Harmless Error—Rejection of Evidence—Subsequent Admission.—That the court at first refused to allow a witness to testify as to certain facts is not ground for reversal, where in less than 10 lines below the record shows that the witness was allowed to testify to the facts.

Assault and Battery—Evidence—Provocation.—In an action for assault and battery, where it appeared that the dispute between plaintiff and defendant first arose three days previous to the assault, and concerned the payment of money by defendant to plaintiff, which defendant asserted and plaintiff denied, it was proper to exclude testimony of a third person that he saw defendant hand the money to plaintiff.

Appeal from Circuit Court, Warren County; J. N. Bush, Judge.
"To be officially reported."

Action by Joseph Harz against the Alabama & Vicksburg Railway Company and another for assault. From a judgment for plaintiff, defendants appeal. Reversed as to defendant railway company, and affirmed as to defendant Dabney.

Harz was a stenographer and clerk in the office of the division superintendent of the Alabama & Vicksburg Railway, and Dabney was chief clerk in the same office. A small sum of money had been collected from a passenger for damage to a window, and, when it reached the superintendent's office, Dabney, in the course of his duties, dictated a letter, through Harz as stenographer, to the company's treasurer, stating that he was remitting the money. The treasurer replied, stating that he did not receive

*See foot-notes appended to *St. Louis S. W. Ry. Co. v. Harvey* (C. C. A.), 20 R. R. R. 379, 43 Am. & Eng. R. Cas., N. S., 379; foot-note appended to *Chicago, etc., Ry. Co. v. Kerr* (Neb.), 19 R. R. R. 369, 42 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Sharp v. Erie R. Co.* (N. Y.), 19 R. R. R. 683, 42 Am. & Eng. R. Cas., N. S., 683; *Baltimore & O. R. Co. v. Deck* (Md.), 18 R. R. R. 640, 41 Am. & Eng. R. Cas., N. S., 640; foot-notes appended to *Robertson v. Louisville & N. R. Co.* (Ala.), 18 R. R. R. 61, 41 Am. & Eng. R. Cas., N. S., 61; foot-notes appended to *Peterson v. Middlesex & S. Traction Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672.

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the money. Upon receipt of this information Dabney then told Harz that he had delivered it to him when he dictated the letter. Harz denied ever having received the money. Dabney then called upon Harz as stenographer to take down a letter to the treasurer to the effect that he (Dabney) had delivered the money to his stenographer. When he reached this point in the letter, Harz refused to write the letter, giving as his reason that such was not the fact. After some words had passed, Dabney told him that he would either write the letter or be discharged. Harz refused to write it, and Dabney, after seeing the superintendent, ordered him discharged. Three days later Dabney met Harz on the platform of the railway company, and assaulted and struck him. Harz brought suit against the railway company and Dabney, alleging in his declaration that the assault was unwarranted and without provocation, and committed by an employee of the railway company while about his master's business. On the trial the court permitted evidence to be introduced as to the dispute between Harz and Dabney, and of the discharge of the plaintiff on that account. Defendant's witnesses, Robinson and Fourshay, testified as to the language used in the dispute by Harz, which Dabney claimed to be insulting, and which he alleged as the provocation for the assault. The court at first refused to permit Dabney to testify whether he was acting for himself or for the company in committing the assault, but afterwards permitted him to testify on this point, and in answer to the question he stated that he "was acting on his own personal account." The defendant attempted to show by witness Day that he (Day) had seen Dabney give Harz the money, but this evidence was excluded on the ground it was not material to the issue, and that it was incompetent to contradict a witness (Harz) on an immaterial point. The case was submitted to a jury, who found for plaintiff against both defendants, and assessed damages at \$1,000. Appellants contend: (1) That the railway company is not liable for the acts of Dabney in committing the assault, since he was acting without the scope of his employment, and that the assault was not committed in the course of his master's business, citing *Richberger v. Express Co.*, 73 Miss. 161, 18 South. 922, 31 L. R. A. 390, 55 Am. St. Rep. 522; and (2) that the damages as to Dabney were excessive, in view of the circumstances connected with the assault.

McWillie & Thompson, for appellants.

McLaurin & Thames, for appellee.

WHITFIELD, C. J. The case of *Richberger v. Express Company*, 73 Miss. 161, 18 South. 922, 31 L. R. A. 390, 55 Am. St. Rep. 522, is decisive against liability on the part of the railroad company on the facts in this record.

On behalf of appellant Dabney, it is said that the court erred in not allowing Dabney to state whether he was acting for himself or the company in committing the assault. It is true that the court did first so refuse to let him testify, but in less than 10

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lines below the record shows that he was allowed to testify on this point. There is no merit, therefore, in this objection.

The testimony of the witnesses Robinson and Fourshay was allowed to go to the jury in full by the court. The defendant Dabney thus got the full benefit of the alleged provocation, although the provocation had been given three days before.

The ingenious argument of counsel to show that the witness Day should have been permitted to testify that he saw Dabney hand the money to Harz is clearly seen, in its last analysis, to be fallacious. The learned counsel for appellant relies on the case of *Prentiss v. Shaw*, 96 Am. Dec. 475, and it must be admitted that it fully sustains their contention to the effect that such testimony is competent to mitigate the damages which the jury may impose by way of punishment, although not competent to mitigate actual damages. Our own court, in *Martin v. Minor*, 50 Miss. 42, has laid down the correct doctrine on this subject, which we now reaffirm. The case of *Prentiss v. Shaw* is a remarkable case of judicial special pleading, and strikes us as a very ingenious, but thoroughly unsound, effort to change a settled rule of evidence to suit the political exigencies of a very unique case. It is not supported by any authority whatever.

It results from this that the judgment of the court below is reversed as to the railroad company, and the suit as against the railroad company dismissed, and judgment as against appellant Dabney is affirmed.

MILLER v. NORTHERN CENT. RY. CO.

(Supreme Court of Pennsylvania, June 27, 1906.)

[64 Atl. Rep. 924.]

Master and Servant—Injury to Servant—Fellow Servants.*—The cars of a railroad company were operated on a siding constructed for the sole use of a coal company by the employees of the railroad, and an employee of the coal company was killed by the negligence of the trainmen while he was repairing a railroad company's car on the siding of the coal company. Held, that he was a fellow servant of the trainmen, within Act April 4, 1868 (P. L. 58).

Appeal from Court of Common Pleas, Northumberland County.

Action by Joseph A. Miller against the Northern Central Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

*For the authorities in this series on the question whether employees of different masters may be fellow servants, see foot-notes appended to *Wagner v. Boston Elevated Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187; *Norman v. Middlesex & S. Traction Co.* (N. J.), 19 R. R. R. 16, 42 Am. & Eng. R. Cas., N. S., 16; *Lookout Mountain Iron Co. v. Lea* (Ala.), 19 R. R. R. 10, 42 Am. & Eng. R. Cas., N. S., 10.

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It appeared that a son of the plaintiff, Casper C. Miller, aged about 22 years, was employed by the Mineral Railroad & Mining Company, a coal mining company, to repair cars on the company's siding. The cars belonged to the defendant. While engaged at work the trainmen employed by the defendant, without warning the deceased, pushed cars onto the siding, with the result that the deceased was squeezed between two cars and so seriously injured that he died within a few hours. The court entered a compulsory nonsuit on the ground that the deceased was a fellow servant of the trainmen, within the meaning of the act of April 4, 1868 (P. L. 58).

Argued before MITCHELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

W. H. Unger and *U. G. Unger*, for appellant.

J. Simpson Kline and *W. H. M. Oram*, for appellee.

ELKIN, J. Three questions are raised by this appeal—the negligence of the appellee, the contributory negligence of the deceased son, and the application of the act of 1868. The court below entered a nonsuit on the first two grounds, but held that the deceased was not a fellow servant, within the meaning of the above-mentioned act. Being of opinion that the case at bar is ruled by *Weaver v. P. & R. Ry. Co.*, 202 Pa. 620, 52 Atl. 30, it will not be necessary to consider the other questions raised. In the case cited this court held that where an iron company constructs a siding on its own land, on which the cars of a railroad company are to be operated by the employees of the railroad company, an employee of the iron company, who is injured by the negligence of the trainmen of the railroad company while he is loading a railroad company's car on the siding of the iron company, is a fellow servant of the trainmen, within the meaning of the act of 1868, and cannot recover damages from the railroad company for the injuries sustained. The facts of the case at bar more strongly favor the appellee here. In that case the injured employee was engaged by the iron company in loading the cars of the railroad company with the manufactured product of the iron company. In the case at bar the deceased son of appellant was a car patcher, whose duties required him to patch or repair the cars of the railroad company before they were loaded with coal for shipment. It is true, as a matter of convenience, he was paid by the coal company; but the work done was on the property of the railroad company, and was the kind of work ordinarily done by its employees. Under the rule of our cases the injured employee must be considered a fellow servant of the employees of the railroad company under the act of 1868.

The learned counsel for appellant contends that the case at bar comes more nearly within the rule of *Spisak v. B. & O. R. R. Co.*, 152 Pa. 281, 25 Atl. 497. With this contention we do not agree. The distinction is manifest. In that case the injured party was a brakeman in the employ of the steel company, which owned

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and operated its own locomotive for shifting cars while they were being loaded and weighed in the yard of the steel company. When the railroad company shunted the cars on the siding of the steel company, its duty ceased until they were loaded and ready to take out. The steel company exercised entire supervision in the operation of the locomotive and the control of the brakeman and others employed in shifting the cars while they were being loaded and weighed. It was during this time the accident occurred through the negligence of an employee of the railroad company. The brakeman who was injured, the yard boss at whose direction the car was moved, the engineer who ran the locomotive, and the other workmen, were the employees of the steel company, engaged in the work of that company, and were not performing any duty for the railroad company. Under these circumstances, the court very properly held the injured party was not a fellow servant of the employees of the railroad company under the act of 1868. The facts of the case at bar so clearly distinguish it from that case that no useful purpose can be served by further consideration of them.

Assignment of error overruled, and judgment affirmed.

BRADFORD CONSTRUCTION CO. v. HEFLIN.

(Supreme Court of Mississippi, Oct. 29, 1906.)

[42 So. Rep. 174.]

Master and Servant—Fellow Servant Rule—Constitutional Provision—Railroads—Construction Companies.*—A construction company, with the usual powers of a construction company, and authorized to own, but not to operate, a railroad, is not a "railroad corporation" proper, so as to fall within the wording of Const. 1890, § 193, partially abrogating the fellow servant rule as to employees of "any railroad corporation."

Constitutional Law—Equal Protection of Law—Fellow Servant Rule—Railroads.†—A construction of Const. 1890, § 193, partially abrogating the fellow servant rule as to "railroad corporations," which excludes railroads operated as an adjunct to the main business of the corporation, rather than as common carriers, is not obnoxious to the fourteenth amendment of the Constitution of the United States.

Master and Servant—Injuries—Fellow Servant Rule—Constitutional Provisions—Construction—Railroad Corporations.*—Const. 1890, § 193, partially abrogating the fellow servant rule as to em-

*For the authorities in this series on the subject of the applicability of employers' liability acts, see foot-notes appended to *Hemphill v. Buck Creek Lumber Co.* (N. Car.), 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411.

†For the authorities in this series on the subject of the constitu-

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ployees of "any railroad corporation," and providing that the "Legislature may extend the remedies herein provided for to any other class of employees," applies to railroad corporations properly engaged in the business of common carriers, leaving to the Legislature the application of the principle to other similar cases, and does not itself apply to railroads owned and operated as an adjunct to the main business of their owners, and hence does not affect an employee of a construction company operating a train in the building of a railroad.

Same.*—The section applies to employees of railroads only when the peril comes by the hazardous nature of the business of operating railroad trains.

Appeal and Error—Review—Parties Entitled to Allege Error.—Where an action for injuries is brought by a servant against a railroad company and a construction company, by whom he is employed and no appeal is taken from a judgment in favor of the railroad company, plaintiff, on an appeal by the construction company from a judgment against it, cannot contend that the two companies were practically one, and that therefore he was an employee of the railroad, and that the doctrine of fellow servants as applicable to the construction company did not arise.

Constitutional Law—Equal Protection of Law—Corporation—Abrogation of Fellow Servant Rule.†—Act 1898 (Laws 1898, p. 85, c. 66) § 1, partially abrogating the doctrine of fellow servants and assumption of risk from defective appliances as to an employee of "any corporation," is unconstitutional as imposing restrictions on all corporations, without reference to any differences arising out of the nature of their business, not imposed on natural persons, and therefore denying corporations the equal protection of the law.

Fellow Servants—Who Are.‡—One employed to shovel from between construction cars dirt, pushed there from such cars by the plow attached to the engine by a cable, is a fellow servant of the engineer as to an injury received by the engine starting while the employee was assisting in replacing the plow in position.

Appeal from Circuit Court, Hinds County; D. M. Miller, Judge.

Action by Thomas W. Heflin against the Gulf & Ship Island Railroad Company and the Bradford Construction Company. From a judgment in favor of plaintiff, the construction company appeals. Reversed and remanded.

Suit by Thomas W. Heflin against the Gulf & Ship Island Railroad Company, a Mississippi corporation, and the Bradford

tionality of employers' liability acts, see foot-notes appended to *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 233, 43 Am. & Eng. R. Cas., N. S., 233.

*†See foot-notes on preceding page.

‡For the authorities in this series on the question whether a locomotive engineer is a vice principal or fellow servant with respect to other employees of his company, see foot-notes appended to *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 383, 43 Am. & Eng. R. Cas., N. S., 383.

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Construction Company, a West Virginia corporation, for damages for personal injuries received by plaintiff because of the negligence of another employee. Heflin was in the employ of the construction company, which was engaged, under contract with the railroad company, in building a new line of railway track for said railroad company. In carrying out its contract in the construction of the line, the construction company had leased from the railroad company some cars and engines, and was using some of these leased cars and one of the leased engines at the time Heflin received his injuries. The work being done at that time was unloading dirt from flat cars in order to make a fill. The crew was composed of a conductor, in charge, an engineer, fireman, two brakemen, and two laborers. Heflin was one of the laborers; his duties being to remove with a shovel the dirt which fell between the cars when the sweep or plow, used in moving the dirt, was pulled from car to car, which was done by means of a cable extending from the sweep or plow to the locomotive, being attached to each. On the occasion in question the plow had been drawn out of place, and Heflin, with others, undertook to prize it back into its place, using an iron bar as a lever. While so engaged, the fireman, who was on the engine, moved the engine forward by order of the engineer, as he claimed, but without order from the conductor. This pulled the cable taut and moved the plow, causing the iron bar to strike and injure the plaintiff. The suit was a joint one against the two companies. On the trial the court below gave a peremptory instruction for the railroad company, but at plaintiff's request gave a like instruction in plaintiff's favor against the construction company, and the jury assessed damages at \$2,500. The Bradford Construction Company appealed from this judgment. No appeal was taken by Heflin from the judgment against him in favor of the Gulf & Ship Island Railroad Company.

On appeal, in answer to the ideas which were urged upon and which controlled the trial court, the appellant contended that the Gulf & Ship Island Railroad Company and the Bradford Construction Company are two separate and distinct corporations, one being a railroad company, authorized by its charter to actually engage in the operation of a steam railroad and in the transportation of freight and passengers as a common carrier, while the other was chartered as a construction company simply, and is not authorized to operate a railroad, but is authorized to build or construct roadbeds and railroad tracks; that the two corporations had contracted one with the other for the construction of the new line of railroad, which the construction company was building for the railroad company, and that all their acts were separate and distinct, and there was no unity of interest or joint liability to Heflin for the injuries received by him; that the judgment in favor of the railroad company, unappealed from by Heflin, precluded any recovery by him against appellant on the idea that the two corporations were and are identical. It was further con-

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tended by appellant that Heflin and the fireman, to whose negligence the injuries are attributed, were fellow servants, employed by appellant in the construction of a railroad, engaged in the same kind of work and subject to the orders of the same superior officer, the conductor, in charge of the crew; that they were fellow servants in the particular instance just the same as if the scoop had been operated by hand, or pulley, or other device; that the operation of the plow in the removal of dirt from the flat cars by steam furnished by the engine was an incident in the work of construction; and that such operation of the scoop or plow by the steam engine was in no sense the operation of a railroad train. Appellant insisted upon a strict construction of section 193 of the Constitution of Mississippi of 1890, since it is in derogation of the common law. Said section is as follows: "Sec. 193. Every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employees, as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employee to waive benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative of any right or remedy that he now has by the law of the land. The Legislature may extend the remedies herein provided for to any other class of employees." Appellant contended that a railroad corporation, within the meaning of this section, is one engaged in the transportation of freight and passengers as a common carrier, whose duties are quasi public in their nature, and that any other corporation does not come within the provision of this section—citing *Ballard v. Cotton Oil Co.*, 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476, holding that chapter 66, p. 84, of the Laws of 1898, which sought to extend the provisions of section 193 of the Constitution to corporations other than railways, was unconstitutional—and therefore, Heflin not being an employee of a railroad corporation within the meaning of the section, and the fireman not being such an employee,

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it has no application to the case, and no liability rests upon appellant for the injury.

The propositions advanced by the appellee were: "(1) In view of the practical and apparent unity between the two corporations, Heflin must be deemed the employee of the Gulf & Ship Island Railroad Company, and therefore no question as to his being a fellow servant of the construction company arises. (2) The construction company, in operating the train in question, was a railroad corporation within section 193 of the Constitution." Appellee contended that the criterion of liability should be the character of the work performed and the hazard connected therewith; that the liability should be the same for a construction company, building a railroad and operating steam engines and cars in performing such work, as for a railroad company, performing a similar work; that the operation of the train was the same, and the hazard and danger to employees were the same, as if engaged in the transportation of freight or passengers as a common carrier; that, under the contract with the Gulf & Ship Island Railroad Company, the construction company was given the right to run trains subject to the rules of the railroad company, and the crew was governed by the same rules as the crews of the railroad company; that the distinction between the two corporations is only in name; and that the construction company was a railroad corporation within the letter and spirit of the constitutional provision. "(3) If not within section 193, then appellant was a corporation, and liable under chapter 66, p. 84, Acts of 1898, which applies to all corporations; and this, notwithstanding the decision in the Ballard Case" (which should be overruled). "(4) The negligent fireman (acting engineer) was in a different department of labor from plaintiff." Appellee further contended that he and the fireman (acting engineer), through whose negligence he received the injuries complained of, were in different departments of labor, their duties being entirely different, and that appellee could not reasonably contemplate the danger or hazard which might result from the negligence of the acting engineer.

McWillie & Thompson and *Jas. H. Neville*, for appellant. .
Alexander & Alexander and *Geo. B. Power*, for appellee.

WHITFIELD, C. J. The chief contention in this case is that the construction company was a railroad corporation, within section 193 of the Constitution, in operating the train in question. The argument, broadly stated, is about this: That section 193 of the Constitution of 1890 can only be upheld, as not violative of the Constitution of the United States, upon the ground that the business of railroad corporations, in operating their trains, is inherently dangerous, and that this inherent danger furnishes the chief basis for distinguishing between the employees of railroad corporations and the employees of other corporations, the nature of whose business is not inherently dangerous; that this was the ground of the decision in the Ballard Case, 81 Miss.

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555, 62 L. R. A. 407, 95 Am. St. Rep. 476; that the true intent and meaning of said section 193, looking to its spirit, and not to its letter, is that the words "railroad corporation" in that section should be made to embrace any person or any corporation, whether chartered as a railroad corporation or not, while it may be actually operating, at the time of any alleged injury, railroad trains; that we are not to look at the name of the corporation, or even at its charter, as determinative as to whether such corporation falls within or without section 193 of the Constitution, but that we are to look solely to the character of the employment, in which the employees of the corporation are engaged at the time of the injury, and that that is the determining feature, to wit, what the nature of the employment is, and not what the character or duties of the employer are, as set out in the charter of such employer; and that, if this is not the true test, then said section 193 violates the fourteenth amendment of the Constitution of the United States, because under any other construction it would be made to apply to employees of railroad corporations whilst acting alone as common carriers of freight and passengers—that is, to railroad corporations, treated as commercial railroads, as the judicial phrase sometimes goes—and fails to protect the employees of other so-called railroad corporations, such as logging railroads, railroads used in connection with mines and lumber corporations, and various other enterprises.

It is said that a mining corporation, or a lumber corporation, which builds its own private railroad for use in connection with its lumber or coal business, is engaged in a railroad business as inherently dangerous, though it may be in a less degree, as a railroad corporation proper, a commercial railroad, and that, unless the former are protected by said section 193, said section is violative of the fourteenth amendment of the Constitution of the United States. On this ground the counsel for the plaintiff assails said section 193, as interpreted in the Ballard Case, as violative of the fourteenth amendment of the Constitution of the United States for the reasons set out above. Curiously enough, the counsel for the railroad company also assails said section 193 as unconstitutional, in their reply to counsel for plaintiff, on the ground that the Ballard Case did not go far enough, insisting that in the Ballard Case the court ought to have held that the employees of railroad corporations meant the employees of railroad corporations while engaged as common carriers in transportation of passengers or freight, and could never apply to such employees of railroad corporations proper, if only they should happen to be engaged in the construction of a new road, or in the transportation of coal or gravel from mines or pits owned or leased by such railroad corporation proper, and, further, counsel contend that the court, in the Ballard Case, should go further and declare that the employees of railroad corporations engaged as common carriers in the transportation of freight and passengers meant only, in said section 193, such employees of such railroad corporations

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as were actually engaged, at the time of the injury, in the operation of the cars, in the running of the trains, etc., and not any such employees as were not so engaged—as, for example, telegraph operators, station agents, etc., or the employees of such railroad corporations engaged in the construction of any work not connected in any way with the actual operation of the railroad trains—and because the Ballard Case did not do that, because the Ballard Case did not go beyond what was strictly in the case, and decide these two points altogether out of the case, the railroad counsel complain, and desire to have said section 193 declared violative of the fourteenth amendment of the United States Constitution. In short, counsel for the railroad company are aggrieved because the court did not in the Ballard Case go beyond the points of decision, and write obiter dicta; and counsel for plaintiff are aggrieved because the court in the Ballard Case, also, did not write obiter dicta in expanding along their line of thought the opinion beyond anything called for by the case made by the facts. It would seem unnecessary to remind counsel, so eminent as those engaged on both sides in this cause, that a court could scarcely do a more unwise thing than to go a step not required by the case made by the facts in any cause that may arise. Certainly it is the object of this court not to write obiter dicta in any case.

What, now, are the answers—addressing ourselves to the precise question here involved—to be made to the contention of counsel for the appellee that the Bradford Construction Company, in operating this train, was a railroad corporation, within the meaning of said section 193, for the reasons set out above? The pleadings in the case treat the Gulf & Ship Island Railroad Company and the Bradford Construction Company as separate corporations. They are so dealt with throughout the whole course of the trial in the court below. It appears that the Bradford Construction Company is a corporation chartered under the laws of West Virginia. It is authorized to own a railroad. It is not authorized to operate one. An individual may own a railroad. Almost any sort of an association of persons may own a railroad, and may own it without operating it. Ownership of a railroad may exist for many purposes other than the transportation of freight and passengers. The ownership and operation of a railroad are things as wide apart as the poles. A careful consideration of the methods by which railroad corporations and construction companies are chartered by the laws of West Virginia will show that the methods are wholly distinct, and that the Bradford Construction Company was chartered in West Virginia as a construction company, and not as a railroad corporation, in any proper legal sense of the words. The well-known usual powers granted in charters for construction companies are wholly different from those usually granted to railroad corporations properly known as such—chartered as such. It is so exceedingly plain that the Bradford Construction Company is not a railroad corporation that

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that matter cannot be seriously discussed; and it must be stated that learned counsel for plaintiff do not so insist. They hesitate, of course, to claim that, as chartered, it is a railroad corporation; but their ingenious insistence is that in this particular case the Bradford Construction Company is, while operating the train in question, under the circumstances shown in the record, to be treated as if it were a railroad corporation, within the meaning of said section 193, or, to put it a little differently, their precise contention is, since, as they say, the Bradford Construction Company was doing work which was railroad work—precisely the same sort of work in all respects, as to danger and otherwise, which the Gulf & Ship Island Railroad would have done if it had been constructing this track—that therefore, looking to the nature of the employment, the dangerousness of the work being done by employees handling a train on the track, etc., the Bradford Construction Company is to be treated, in this instance, as if it were a railroad corporation. If this test were adopted, undoubtedly every logging railroad, every railroad running to a mine, every railroad, of whatever size or character, owned or operated by any sort of partnership, association of persons, or even by any private individual, would necessarily have to be held as a railroad corporation, within the meaning of said section 193, merely and only because the nature of the work done by its employees was of a like sort of dangerousness with that performed by the employees of railroad corporations proper. No such contention can possibly be sustained by any true reasoning, regard being had to the history of our said section 193. The argument is rather one for what the said section 193 of the Constitution ought to have declared the law to be than what it did declare the law to be.

What is the plain and simple history of the adoption of this section? We set it forth fully in the Ballard Case as follows: "Section 193 of the Constitution of 1890 was adopted after the decision of the United States Supreme Court in *Missouri R. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, in 1888, and was manifestly intended to authorize legislation along the lines held constitutional in that case—that is to say, to abolish the fellow servant rule in the case of employees of railroad corporations whose business was known to be inherently dangerous—and the purpose of the last clause of section 193 was to extend the remedies therein provided for to any other class of employees of corporations or persons whose business was, like that of railroads, inherently dangerous, or whose business was so different from the business of other corporations or persons as to furnish the basis for a classification of the business of such corporations or persons, under which their employees might be permitted to sue without reference to the fellow servant rule, while the employees of corporations or persons not having that sort of business could not so sue; in other words, to permit a classification based on 'some difference bearing a reasonable and just relation to the act in respect to which the classification is pro-

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posed.' Ellis' Case, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. The use of the word 'class' in the last clause of section 193 of the Constitution of 1890 clearly indicates that it was not the purpose of the section to extend its provisions to all employees of all persons or corporations, but only to such employees of persons or corporations as operated businesses between which and the businesses of all other persons or corporations there exists some difference—some substantial difference—such as would be held a warrant for a classification conferring upon such employees of the first class, and denying to employees of the latter class, the benefits of section 193 of the Constitution. The thought was that a classification might be made, giving to the employees of some corporations and of some persons the right to recover, and denying it to the employees of all other corporations or persons, provided that classification was based upon some distinctive difference between the kinds of business conducted by the one set of corporations or individual employers and the others. Section 193 was itself a special classification of railroad employees, based on the known hazardous character of the operation of railroad cars. It was the direct product of the Mackey Case, *supra*. It is not, therefore, to be supposed that the last clause of the section meant any more than that there might be other classifications of the employees of corporations or individual persons, based also on some distinguishing difference in the nature of the businesses. We do not understand the Supreme Court of the United States, in its many decisions on this subject, to mean that the dangerousness of a particular business would be the only basis for distinguishing between the businesses of corporations or individual employers in the classification, but rather that any substantial difference between particular businesses which would serve as a reasonable basis for a classification, allowing the employee in the one case to recover, and in the other case not, is sufficient."

There never was a wiser building than the writing of this section 193. Few abler lawyers ever lived than had a hand in the drafting of that section. That great jurist and statesman, the late senator George, is well known to have been its author. The purpose he, and those associated with him, in framing this section, had in mind, was not to provide, in a section in the organic law of the land, a remedy for all employees of all corporations, or of all persons, but to go slowly, surely, and safely, by providing only such remedy as the Supreme Court of the United States had already said might be provided without violating the fourteenth amendment of the Constitution of the United States—to abrogate, as far as safely might be done, the absurdities of the fellow servant doctrine. They did not wish to be "hoisted by their own petard," by framing a section which would be wholly stricken down by that great court; for, knowing the decisions of that court up to that time, as we particularly pointed them out in the Ballard Case, they knew that the United States Supreme Court had in the Mackey Case, *supra*, sanctioned legislation giving to the employees

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of railroad corporations proper—such railroads as are sometimes known as “commercial railroads,” engaged in the transportation of freight and passengers—remedies denied to such employees of other corporations. They knew that that classification had been vindicated upon the ground that the business of such corporations was inherently dangerous. They knew that they might, therefore, follow in the footsteps of the United States Supreme Court in going that far; and they went that far, for that reason; and they went no farther, for that very wise reason. And so, as we said in the Ballard Case, if it be only correctly and carefully read, the whole scope and purpose and spirit of said section 193 of our Constitution is to give the remedies therein given to the employees of railroad corporations proper, such as are engaged in the transportation of freight and passengers, and to such railroad corporations alone. It might be wise to extend such remedies to the employees of any business, or any corporation, or any partnership, or any association of persons, owing logging railroads, or lumber railroads, and the like; but all that (so far as what was actually done by the constitution makers is concerned) they left, and they expressly left, by the last clause of the section, to be enacted or not enacted by the Legislature as the developments of the future might show to be wise and best. They gave the Legislature the fullest power to deal with all other classes of corporations. They limited the relief which they granted within the bounds which we have indicated for the wise reason which we have stated. The relief they gave was very, very great. The instances in which injuries occur on logging or other railroads and the like are as nothing in comparison with the multitudinous instances in which injuries are daily happening to employees of railroads engaged in the transportation of freight and passengers. They were dealing with the great, paramount, supreme need of the situation. They chose to make the relief granted as to that supreme need safe, by making it stand out, to itself, upon the basis of the distinction vindicated by the Supreme Court of the United States. They declined to imperil that great relief by attempting to fill a section of the Constitution with the infinite details that would obtain in a thousand other forms of relief, wise as it may be, in its time, but left to its time, and to the Legislature of its time. That is what they intended, and what we are to ascertain is just their intent, in what they did; not what might have wisely been intended, but what in that one section (193) they did intend. There are many decisions from other states supporting most abundantly our view as to the true construction in this regard. We cite a few of them below: *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Williams v. Northern Lumber Co.* (C. C.) 113 Fed. 385; *McKivergan v. Lumber Company* (Wis.) 102 N. W. 332; *Palangio v. Wild River Lumber Co.*, 86 Me. 315, 29 Atl. 1087; *Beeson v. Busenbark*, 44 Kan. 673, 675, 25 Pac. 48, 10 L. R. A. 839.

In the McKivergan Case the facts and holding were these:

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"Rev. St. 1898, § 1816, which is a part of chapter 87, concerning railroads, makes every railroad company liable for damages sustained by employees caused by the negligence of other employees. Other provisions of the chapter relate exclusively to railroad corporations doing the usual business of public or commercial railroad. Thus provision is made for equality of transportation rates, for the furnishing of cars on demand, for the maintenance of guards and fences, and for subservience to regulations for the shipment of grain, carrying of live stock, etc. The power of exercising the right of eminent domain is also given to railroads included within the purview of the chapter. Section 1861 defines the phrase 'railroad corporation' as embracing any company, corporation, or person, managing or operating a railroad, whether as owner, contractor, mortgagee, assignee, or receiver. Held, that section 1816, notwithstanding section 1861, embraces within its provisions only railroads engaged in a general railroad business for the carriage of passengers and freight, and has no application to a private railroad operated in connection with a logging and lumber business." And that case expressly repudiates the case of *Roe v. Winston*, 86 Minn. 77, 90 N. W. 122, which announces a contrary construction of the Wisconsin statute by the Minnesota Supreme Court.

In *Griggs v. Houston*, the Supreme Court of the United States held that a construction company was not a railroad company within the meaning of sections 1166, 1167 of the Code of Tennessee of 1858, visiting penalties upon a railroad company injuring any person or animal by reason of failing to observe precautions marked out by the statute. In *Williams v. Lumber Co.*, from the United States Circuit Court for Minnesota, whose state Supreme Court holds a contrary doctrine, it was held that section 2701 of the General Statute of Minnesota of 1894, providing that any railroad corporation owning or operating a railroad in Minnesota should be liable for all damages, etc., did not apply to a logging railroad built and operated for private purposes, and not as a common carrier. We quote the observations of that court at page 385 to show that it would be immaterial whether there were any other railroad corporations in our state when said section 193 was adopted or not, if it be clear that it was not the intent of said section 193 to embrace any others. Undoubtedly, if there were others then in existence, such as logging and lumber railroads, the fact that they are not mentioned in said section 193 is the strongest kind of evidence that they were not intended to be included within its scope; on the contrary, if there were none in existence, then, it would still depend, as it seems to us, upon the fact as to whether the Constitution makers, at the time they adopted the section, then intended to embrace such others within the scope of said section. The language of Justice Lochren is as follows: "It is said by counsel for defendant that it cannot apply to a railroad of this kind, because there was no such railroad in operation at the time of the passage of the

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act in 1887, and therefore it could not have been considered by the Legislature. I do not know what the fact is as to that. My impression is that counsel is right as to the fact that there was no such railroad in operation at the time in this state; but I am not sure, and will not assume, whether that is the fact or not. The language in this statute indicates that it was not intended to include roads of this kind. But, if it were the fact that these railroads were in existence in the state, as they are now, then the presumption would be still stronger that they were not intended to be included in that act, for the reason that the language of the act would exclude them; and, if they were in operation, it must be presumed that the fact was known to the members of the Legislature at that time. The fact that language was used that would ordinarily exclude would be stronger evidence that they were intended to be excluded than if there were no such railroads in operation at the time and therefore they were not considered. I think it is true that an act may take effect upon business that was not carried on at the time when the act was passed, if the language of the act is such that it will include that kind of business, although the same was not known at the time. But it seems to me that the language of this statute does not include railroads of this kind. Therefore I feel constrained to hold that the ordinary doctrine with respect to negligence on the part of the fellow servants applies in this case, and that such negligence is a part of the risk taken by the employee, and cannot be imputed to the employer."

In *Palangio v. Lumber Co.*, it was held that a railroad constructed and operated by a manufacturing corporation in its private business was not a railroad corporation within the meaning of section 141, c. 51, of the Revised Statutes of Maine, which made railroad companies liable to pay laborers employed by contractors under certain conditions. The court said: "Surely it is impossible to regard such a corporation as a railroad company. It does not possess one of the distinguishing characteristics of a railroad company. True, the company has constructed a roadbed upon its own land, upon which it had placed sleepers and iron rails for the transportation of its own lumber from its own lands. But this no more makes it a railroad company, within the meaning of the law, than the construction of a camp in which to feed and lodge its laborers would make it a hotel company. An individual can lay a railroad track upon his own land for his own use, without obtaining a railroad charter, and without thereby making himself a railroad company; and so can a lumbering corporation."

The case of *Beeson v. Busenbark*, is unanswerable, in our opinion, upon this particular proposition. In that case it was decided that a firm or partnership composed of private persons was not a railroad corporation within the meaning of section 1251 of the General Statutes of 1889 of the State of Kansas. In this particular case the Kansas & Colorado Railroad Company engaged

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certain contractors to construct its road, which contractors sublet such construction to Beeson & Selden. Beeson & Selden were simply private persons constituting a partnership to construct railroads, and they employed and paid the trainmen that operated a train on the railroad so constructed, and Busenbark was injured whilst cleaning an ashbox under the engine of one train; another train operated by Beeson & Selden being backed against it and causing the injury. The contention was that Beeson & Selden were to be held as within the meaning of this act giving the employees of railroad companies remedies. The court say: "The statute of 1874 is to be construed strictly. It cannot apply to masters or employers not within its terms. Neither can it be construed to give protection to persons not in the employ of a railroad company. The statute has reference to servants and employees of railroads, not to servants and employees of other masters, companies, or corporations. The statute does not include partnerships, or persons in the employ of partnerships; it does not include construction companies, or persons in the employ of construction companies; it does not include bridge companies, or persons in the employ of bridge companies, although such partnerships and companies construct railroads, build bridges, and do other public work. Statutes similar to the one referred to, changing the common-law rule between masters and servants, employers and employees, are in force in a number of the states of this country; but, with one exception, these statutes are all confined in their operation to railroad companies. The single exception, the Rhode Island statute, embraces only the cases of common-law carriers. 7 Am. & Eng. Ency. of Law, 859; 24 Am. Law Rev. No. 2, 1890, p. 181. The Legislature has full authority to extend the operation of the statute to all corporations, companies, masters, or employers of every, occupation or business. It has not seen fit to do so. It might very properly have extended the operation of the statute to all partnerships, masters, or others engaged in the work of operating trains upon railroads, or in constructing railroads, or other like work. It has not done so. In various opinions of this court we have frequently held that the statute applied to persons engaged in the hazardous work of operating trains upon a railroad; but in all those cases we had reference to the employees of a railroad company organized in this state, or of a railroad company doing business in this state. *Railroad Co. v. Haley*, 25 Kan. 35; *Railroad Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291; *Bucklew v. Railway Co. (Iowa)* 21 N. W. 103. Again, we have held that when a railroad is being constructed, and is in the exclusive possession of, and operated by, a contractor for its construction, and the railroad company, at the time the injuries complained of are committed, has no control thereof, such company is not liable for the damages resulting from the operation of such railroad. *Railway Co. v. Fitzsimmons*, 18 Kan. 34; *Railroad Co. v. Willis*, 38 Kan. 330, 16 Pac. 728. If the statute of 1874 were

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extended so as to include the firm of Beeson & Selden and their employees, it must also be extended so as to include every firm, partnership, contractor, or private person having servants or employees at work on the track or in the yard of a railroad company. *Union Trust Co. v. Thomason*, 25 Kan. 5; *Railroad Co. v. Harris*, 33 Kan. 416, 6 Pac. 571; *Railroad Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567. The statute does not go so far. The courts construe laws, but do not make them."

We have read, with great care, every authority cited by learned counsel for appellee, and we shall notice the chief ones as briefly as the limits of the opinion will allow. The two English cases referred to construe the English employer's liability act, and were so decided manifestly because of the language of the act. *Mathew, J., in Cox v. Great Western Railway Co.*, 9 Q. B. D. 109, says: "The language of the act is that the plaintiff can only recover against his employers where he has sustained an injury 'by reason of the negligence of a person in the service of the defendants who had the charge of any signal, points, locomotive engine, or train upon a railway.'" In other words, that act entitled one to recover for the negligence of any person who had charge of a train upon a railway. And so *Pollock, B., in Doughty v. Firbank*, made the same construction in 10 Q. B. D. 359. The very reason given by him for holding that railways owned by colliery owners and others were railway companies within the meaning of the English act is "that the word 'employer' includes a body of persons corporate or unincorporated." Section 193 distinctly and expressly uses the language "railroad corporation." The case of *McKnight v. Iowa Construction Co.*, 43 Iowa, 406, construes section 1307 of the Code of Iowa of 1873, providing "that every corporation operating a railway shall be liable," etc. It is true that the language in that case squarely sustains counsel for plaintiff; but we think the opinion is unsound on the ground on which it goes, but that the decision is right, and should be rested on the ground that the language "every corporation operating a railway" embraces a railroad corporation or any other corporation operating a railway.

Railroad Co. v. Phillips, 90 Ga. 829, 17 S. E. 82, is no authority for the position of appellee, but might furnish some sort of authority for holding the Gulf & Ship Island Railroad Company liable on the facts in this case. The case of *Union Pac. R. R. Co. v. De Busk*, decided by the Colorado Supreme Court and reported in 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221, is to our mind a thoroughly unsatisfactory opinion in every respect. We decline to approve any of its reasoning, or its conclusion. In that case the court absolutely held that the phrase "railroad corporations" should embrace "any body, company, or association or persons, whether technically incorporated or not, engaged in the operation of railroads," and apologizes for its construction of these words by saying they did so "to avoid the necessity of declaring the act unconstitutional as violating the fourteenth amendment."

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This objection, which, by the way, runs through nearly all the cases taking the view of the Minnesota Supreme Court, is not tenable. It is well said by the Supreme Court of Missouri in *Humes v. Mo. Pac. Ry. Co.*, 82 Mo. 221, 52 Am. Rep. 369, in meeting this objection: "It is further alleged against this statute that it is partial and special because it 'is directed against railroads alone, while no other common carriers are brought within its operation.' Had the Legislature deemed it essential to the protection of human life and private property, they would doubtless have extended the statute to carriers by coach and water. But as the class of property and human life protected by this provision of the statute is not exposed to a like peril incident to coach and water travel, the occasion and necessity for so extending the statute does not exist. Class legislation is not necessarily obnoxious to the Constitution. It is a settled construction of similar constitutional provisions that a legislative act which applies to and embraces all persons 'who are or who may come into like situations and circumstances' is not partial." It is enough if the Legislature or a Constitution shall deal with all in the same class alike. The constitution makers had the perfect right to select railroad corporations proper, engaged in the transportation of passengers and freight, if it had chosen to do so, without embracing logging railroads, lumber railroads, and the like, although the inherent danger of the business might be the same in the business of all such corporations, if only they embraced all railroad corporations proper in their classification. It was not for a logging railroad company or a lumber railroad company to say section 193 of the Constitution violated the fourteenth amendment, if said section extended the protection of the law equally to all railroads of the classes named, railroads proper, engaged in the business of common carriers. They constitute a class to themselves, and, if all in that class were similarly dealt with, it was immaterial whether the Constitution went further and embraced logging railroads and lumber railroads, which were not in that class. It is too clear for argument that the fear expressed in so many cases that the employer's liability acts would be declared unconstitutional by the Supreme Court of the United States, unless they embraced within their scope the employees of all corporations of every kind whose business is inherently dangerous, like that of railroad corporations proper, is wholly unwarranted. The Legislature may select any class of corporations it pleases, leaving out other and different classes, provided, only, that the employees of the class dealt with are all treated alike. They may select railroad corporations proper, and give to their employees certain remedies based on the inherent danger of such railroad business, and leave out logging railroads and lumber railroads and the like, although their business may be to some extent as inherently dangerous as the business of the latter. What is it to them, if only all railroad corporations proper are dealt with alike?

Union Trust Co. v. Kendall, 20 Kan. 515, holds simply that the

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Union Trust Company, in its capacity as trustee of the railroad, was within the statute providing that every railway company or corporation in the state, and every assignee or lessee of such corporation, should be liable, etc. *Rouse v. Harvey*, 55 Kan. 589, 40 Pac. 1007, likewise holds that a receiver is within a similar statute. *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270, also holds that receivers are within the language of the Massachusetts act providing that every railroad corporation shall be responsible, etc. *Farrell v. Union Trust Co.*, 77 Mo. 475, also holds that a trustee of a railroad is within the provisions of such statute. *Sloan v. Cent. Iowa R. R. Co.*, 62 Iowa, 728, 16 N. W. 331, also holds that a receiver is within such a statute; that statute, however, saying "persons owning or operating railways" should be liable, and the court held that the receiver was a person operating a railway within the meaning of that section. The truth is that there is a good deal of confused writing as to the liability of receivers, trustees, etc., of railroad corporations, within the meaning of the various employer's liability acts. The reason at the core of all such liability is that the real defendant in every such case is the railroad corporation, and not the receiver. When that distinguishing feature is clearly held in view, there is no difficulty in the decision of any of these cases. The matter was put on its proper ground by the Supreme Court of the United States in *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796, where the court say: "We agree with the Supreme Court of Illinois that it was not intended by the word 'his' to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself or his agents, but that, with respect to the question of liability, he stands in place of the corporation. His position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of such corporations for causes of action accruing under their predecessors in office. * * * Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands." In *Peirce v. Van Dusen*, 47 U. S. App. 339, 78 Fed. 693, 24 C. C. A. 280, that great jurist, Mr. Justice Harlan, said: "If the reasoning of the Georgia and Texas courts be applied to the Ohio statute, it cannot be held to embrace the employees acting under the receiver of a railroad corporation; but in our judgment the statute is applicable to actions against receivers of railroad corporations. To hold otherwise would be to subordinate the reason of the law altogether to its letter." As said by Mr. Justice Valliant in *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 485, in a masterly opinion: "The receivership is pro hac vice the corporation itself, under the management of one man, instead of that of a board of directors." In that very case the receiver was held embraced by the law of

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1897, which act, however, defines railroad corporations to mean "all corporations, companies or individuals owning or operating a railroad. The same reason why receivers and trustees are held within the meaning of these employer's liability acts is also set out in *Farrell v. Union Trust Co.*, 77 Mo. 477, as follows: "It was not expressly decided that the receiver would be, but we see no reason why he should not be, liable. He stands in the place of the company, represents the company, and while not directly, the railroad company is ultimately, responsible, because damages recovered against the receiver in such a case he may charge to the company in his settlement." In *Rouse v. Harry*, 55 Kan. 598, 40 Pac. 1010 it is said, amongst other things: "A suit against a receiver is in form against an individual, but in substance it is against the property proper in his charge." It may be remarked, by the way, that in this very authority relied on by counsel for appellee it is said: "The distinction between contractors employed in the construction of a railroad and a railroad company is broad and well marked."

We have reviewed these leading authorities cited by the learned counsel for appellee to sustain his proposition that the Bradford Construction Company is to be treated, whilst operating this train, as a railroad corporation, within the purview of said section 193, and we think we have demonstrated that each case cited from was upon employer's liability acts materially different from section 193 of our Constitution, or that they are, in the two or three instances pointed out, wrongly decided, or decided rightly for wrong reasons. We are clearly of the opinion that said section 193 of our Constitution applies to railroad corporations proper, which are engaged in the business of common carriers transporting freight and passengers, and not to logging railroads and lumber railroads and the like, owned or operated by individuals, corporations, or partnerships, as adjuncts to their main business. We leave undecided, for the present, the question whether, granting that the railroad corporation involved in the particular case is a railroad corporation proper, engaged as a common carrier in transporting freight and passengers, it would not be liable, under said section 193, to its employees, if at the time of the injury it were engaged in constructing some new railroad or branch railroad, or in hauling coal and gravel and the like from mines and pits. We decline to anticipate anything. We decide only the case before us, but we refer, as shedding light on this question, to *Gulf Railroad Co. v. Howard* (Tex. Civ. App.) 75 S. W. 803, where the court held that a somewhat similar provision applied to employees operating cars in roundhouses, coal chutes, etc. This last proposition is entirely distinct from the proposition which we think it is proper to decide in this case, and that is that said section 193 of the Constitution applies to the employees of railroad corporations proper, engaged as common carriers in the transportation of freight and passengers, and to such employees only when injured whilst doing work in some manner connected with the

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use and operation of the railroad. This latter proposition has been expressly decided in *Luce v. Chicago, etc., R. R. Co.*, 67 Iowa, 75, 24 N. W. 600, the court holding that "one employed in a railroad coalhouse, and injured by the negligence of a co-employee whilst loading coal upon a car, cannot recover from the company, because the injury in such connection is not in any manner known as the use and operation of a railroad"; and also in *Blomquist v. Railway Co.*, 65 Minn. 69, 67 N. W. 804, in which the court said: "In order to sustain the law, we have, by judicial construction, limited its operation to those employees of railroads who are exposed to the peculiar dangers attending the operation of railroads, or what are, for brevity, called 'railroad dangers.'"

It manifestly never was the purpose of the constitution makers in said section 193 to give to all employees of railroad corporations the remedies therein provided. They meant such employees as were imperiled by the hazardous nature of the business of operating railroad trains. The very ground upon which the United States Supreme Court all along held that such legislation was constitutional was that the nature of the business of operating railroad cars is inherently dangerous. It would be absurd to hold that there was any inherent danger in discharging the duties of ticket agent, or telegraph dispatcher, or many other officers in which employees of railroads are at work. It would be equally absurd to hold that employees of a railroad corporation engaged in the construction of a roundhouse, or in any other work not at all connected with the operation of the cars, were engaged in work inherently dangerous. They would be in no more danger than any other like employee of any other master. In short, the reason which sustains said section 193 of the Constitution being the inherent danger attending the actual operation of railroad trains, the remedy must be limited to those employees whom such danger imperils.

2. So far as the first contention of counsel for appellee is concerned, it is sufficient to say that it is without real merit. The Gulf & Ship Island Railroad is out of the case by the judgment of the court below, unappealed from, and the evidence in the case shows that Heflin was the servant of the construction company.

3. And, so far as the contention that the Ballard Case is unsound, it is sufficient to remark, first, that that case was considered for two years by this court; second, that it was argued four times orally; third, that it received the concurrence of five of the judges of this court; fourth, that every argument that has been advanced now to show that the mere fact of incorporation was a defense was earnestly pressed in the argument of the Ballard Case; fifth, that that case has stood as the law of the land for some years without question. It is simply waste of time to ask this court to overrule a case so thoroughly and patiently considered, and which has been so long established as the law of the land.

4. The fourth and last contention of appellee is that Heflin was not a fellow servant of the engineer, even at the common law. We have carefully considered the cases cited under this head, but

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we find ourselves constrained by the decisions of this court in the past, which all know went to the utmost verge in extending the fellow servant doctrine, to hold that Heflin must be regarded as such fellow servant, even if regard be had to the fact that at the very moment of the injury he was not shoveling dirt from the rails, but assisting in replacing the appliance which had fallen from the flat car back thereon.

It follows, from these views, that the judgment below should have been for the appellant.

Reversed and remanded.

ST. LOUIS, I. M. & S. RY. CO. *v.* MIZE.

(Supreme Court of Arkansas, May 28, 1906.)

[95 S. W. Rep. 488.]

Master and Servant—Railroads—Defective Track—Repair—Notice—Duty of Master.*—In so far as its employees are concerned a railroad company is under no obligation to repair its track, which has become unsafe, provided due and timely notice of such defect is given so that the employees may avoid the danger.

Same—Verdict—Conflicting Evidence.—In an action for death of a locomotive fireman by the engine being driven through a defective bridge, conflicting evidence as to whether deceased had notice of the defect in the bridge prior to the accident held not so conclusive as to require reversal of a judgment for plaintiff on appeal.

Battle, J., dissenting.

Appeal from Circuit Court, Lee County; Hance N. Hutton, Judge.

Action by Nellie Mize, as administratrix of W. H. Mize, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Johnson, for appellant.

J. H. Harrod, for appellee.

HILL, C. J. This case has been here before, and a judgment for \$6,000 in favor of appellee was reversed January 10, 1903, on

*For the authorities in this series on the subject of the duties and liabilities of railroad companies, as employers, with respect to unsafe tracks and roadbeds, see foot-notes appended to *Van Blarcom v. Central R. Co.* (N. J.), 17 R. R. R. 699, 40 Am. & Eng. R. Cas., N. S., 699; *Henry v. Ann Arbor R. Co.* (Mich.), 17 R. R. R. 580, 40 Am. & Eng. R. Cas., N. S., 580; foot-notes appended to *Fuller v. Tremont Lumber Co.* (La.), 17 R. R. R. 710, 40 Am. & Eng. R. Cas., N. S., 710.

For the authorities in this series on the question whether trainmen assume the risks from defective tracks, see foot-notes appended to *Western Ry. v. Russell* (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225.

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account of the failure of the court to give an instruction requested by appellant. *Railway v. Mize*, 71 Ark. 159, 71 S. W. 660. The facts are set out in the former case. This is an appeal from a judgment of \$6,500 in favor of the administratrix.

The appellee introduced A. Bolinger, the trainmaster, and proved by him that he learned at his bedside, a little after 1 o'clock a. m. by telephone from his office, of a message from Conductor Rice of the passenger train No. 52 to the effect that bridge 575 had been on fire; that he had put it out, but the bridge could not be crossed until repaired; that five bents needed repair; and later learned that two were in the water. Bolinger gave instructions for the freight engine then at Malvern to go to the burnt bridge. The trainmaster gave the following order: "No. 182. L. Rock, 3—29—1900. C. & E. Eng. 581 and all trains North Malvern, Jernigan, Opr. C. & E. All trains south Benton, Speer, Opr. Eng. 581 will work between Malvern and bridge 575 between mile posts 373 and 374 with right of track against all trains except No. 52 (Fifty-two) Eng. 706. A. B. M. O. K. to Silverthorn and Seeley, Eng. 581, 1:42 a. m. A. B. M." This was sent under Bolinger's telephonic direction by Mack, the operator whose initial appears under Bolinger's. Mize was fireman on engine 581, and Seeley was engineer and Silverthorn conductor of the freight train which the engine was pulling. Bolinger finds no record in his office of a telegram communicating to Mize's train information of the burned bridge. Silverthorn, at Malvern, sets out the freight train, and takes on Rupprecht's bridge train, which happened to be at that station, and proceeded under order No. 182. He stopped a few minutes at Traskwood, and then went on pursuant to this order, and ran into the burned bridge, and Engineer Seeley and Fireman Mize were buried under their engine. The law of this case was settled in the former appeal, wherein it was said: "In so far as its employees are concerned, if the track is injured, and thereby becomes unsafe, the company is under no obligation to repair the same. It must, however, give them due and timely notice of the injury, so that danger may be averted, and, having given such notice, may take whatever time it may deem proper to repair the same, without increasing liability to its employees on account of the delay [citing authorities]. The object of the notice is to enable them to protect themselves against injuries by adopting necessary precautions for that purpose. Any notice that will accomplish this object will be sufficient."

The court properly instructed the jury that, if the company had notice of the burned bridge, it was its duty to give the employees in charge of the train due and timely notice of the injury to the track, and a failure to give such notice was negligence, and if Mize's death resulted from such negligent act his administratrix could recover. The fact that train order 182 directed this train to proceed to this bridge without warning of its condition, the absence from the trainmaster's records, where such messages are

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usually all kept, of any message to this train crew of the burned bridge, and the fact that Seeley, the engineer, and Mize, the fireman, were thoroughly acquainted with the road, was all competent and substantial evidence tending to prove that notice was not given to the train crew of the danger they were ordered into. The plaintiff rested after proving these facts and some other circumstances, and this was sufficient testimony to go to the jury, and sufficient to sustain a verdict finding negligence against the company. The difficulty in the case is whether the jury was warranted in disregarding the appellant's evidence of notice to Mize of the burned bridge and its location. On the cross-examination of Bolinger, the trainmaster, the appellant proved that he sent the following telegram: "March 28. To Conductor Silverthorn, Malvern: Set out your train at Malvern, and take Rupprecht's bridge outfit to burned bridge, 575, between mile posts 373 and 374, quickly as possible. There are five bents of this bridge burned. [Signed] A. B." This was not in the records, and much testimony is adduced explaining its absence. Silverthorn testified that the original was stolen from his clothes some days after the wreck. So much confusion is shown regarding this message that appellee claims positively that there was never such a message. Silverthorn swears that he received it, told Mize of it, and read it to him. If that was believed, that should terminate the case; but Silverthorn had sworn in the case previously that he did not know of his own knowledge whether Mize knew of the burned bridge and their destination or not, and yet in this case testified to telling him of it twice at Malvern and once at Traskwood, and reading him this message. There were other matters in Silverthorn's evidence which did not sound like "a plain tale simply told," and the jury were fully justified in totally disregarding his evidence as to notice. The chief difficulty in the case is as to testimony of Rice, Schimmelpfennig, Baskerville, Griffin, and Buidici, all trainmen, who swore to Mize being informed at Traskwood of the burned bridge and its location. Rice said that Mize and Seeley and all the train crews were in the station office with Silverthorn and himself, where all talked about the burned bridge and its location. Silverthorn also said Seeley and Mize were in the station together at such conversation, and that they were violating a rule of the company forbidding both engineer and fireman being away from the engine at the same time. Schimmelpfennig was engineer of the passenger train (Rice's), and he says he did not know Mize, but did know Seeley, and at the depot at Traskwood had a conversation with Seeley about the burned bridge. He tells of several other trainmen being present and that the bridge was definitely located by No. 575, and between mile posts 373 and 374, and that he told Seeley of this. Yet the witness admitted that he had testified in this case four years previously, and that then he did not testify that Seeley had this information, and had testified that he only had a general conversation with him there, and did not claim he was

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told anything about the number of the bridge or mile posts. J. C. Baskerville was brakeman on Rice's train, and he swears that Seeley and Mize were both in the telegraph office at Traskwood discussing the burned bridge. These facts he seems to know, and none other. Frank Griffin was fireman on the passenger train. He says that about five minutes after Mize's engine pulled into Traskwood he was called by Mize to help him clean his engine; that it had a hot driving box, and he shut off the water for Mize, and helped him fix his engine, and in that conversation told him about the burned bridge, and shutting off water when he got there. He did not know where Seeley was when he was with Mize at the engine. The engine was "quite a distance" from the depot. He was on his engine close to Mize's when Seeley and Mize pulled out. After he finished helping Mize he went to platform of the depot, but cannot remember seeing Mize there, and does not know whether or not he left his engine during the stay at Traskwood. He says he knew of no rule forbidding engineer and fireman both being absent from the engine at the same time. Giudici was brakeman on Mize's train, tells of changing the signals when the character of the train was changed from freight to an extra, and the fireman's knowledge of them. He tells of Silverthorn receiving the message to take Rupprecht's outfit to the burned bridge, and reading it. He says that he does not know whether at Malvern Mize ever saw or learned of this message; that he knows that Silverthorn, the conductor, and the other brakemen, Saunders and Yokem knew of it. He says that at Traskwood Mize was standing in front of the depot, and talked with Schimmelpfennig and the others about the burned bridge and its location. He says Mize's engine was close to the depot, the caboose right opposite the depot, and the engine four car lengths away, making engine about 150 feet away from the depot.

This is but a bare outline of the leading points in these witnesses' testimony relating to notice. Some of these witnesses are badly crossed by their former testimony, some have keen recollections of one fact and no other facts, while others read as if given by candid and truthful men; but the jury and trial judge who saw them can much better judge of that than a court reading the record only. It is possible to reconcile much of this testimony and minor conflicts to the usual difference in point of view and strength of recollection in the witnesses testifying. Had the jury accepted this testimony, no question could have possibly been raised on it; but the jury has not accepted it, but rejected it in toto. The question is whether they were justified in doing so, or was it an arbitrary rejection of fair, uncontradicted, unimpeached testimony that the court must rectify by setting aside the verdict. The question is not free of difficulty, and has caused the court doubt and hesitation. In testing the action of the jury in disregarding this testimony it must be borne in mind that Seeley, the engineer, and Mize, the fireman, were

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both thoroughly familiar with the road, and were careful men, and both in the full possession of their senses, and hence it would naturally call for strong evidence that they had full definite and accurate and detailed knowledge of the location of this burned bridge, and yet a few minutes after such explicit information ran the train into it at a rate of 15 or 20 miles an hour. A majority of the court is of the opinion that there are sufficient contradictions and impeachments and varying stories to prevent this being classed as a case where the jury has arbitrarily disregarded creditable, reasonable, and unimpeached testimony.

There are no other questions of any moment in the case. Two of the instructions are criticised; but the court is of opinion that the law was correctly given, and, while the phraseology in every instance might not have been the best, yet the law was correctly and fairly given, and the jury could not have been misled by any of the instructions.

Objection is taken to many expressions of counsel in argument. They have all been considered, and the court is unable to see prejudicial error in any of them. The question of where a case may be reversed for improper argument has been gone over so frequently of late that it would serve no useful purpose to further discuss the subject here. The objectionable argument may have been over fervid, and too strongly denunciatory; but great latitude must be allowed counsel in presenting his cause, and it is not thought that any of the remarks excepted to were cause for reversal.

The judgment is affirmed.

BATTLE, J., dissents.

WHALEN v. PENNSYLVANIA R. Co. et al.

(Supreme Court of New Jersey, June 11, 1906.)

[63 Atl. Rep. 993.]

Master and Servant—Injuries to Third Persons—Actions—Joint Liability—Pleading.*—In an action for personal injuries against a carrier and its employee, a declaration, alleging that defendants failed to use reasonable care to carry plaintiff safely and so negligently operated the boat on which he was riding that through the negligence of the defendant carrier and its servant plaintiff was injured, stated a cause of action against defendants jointly, though it was further alleged that the boat was under the control of the servant.

*See extensive note, 20 R. R. R. 457, 43 Am. & Eng. R. Cas., N. S., 457; *Dudley v. Illinois R. Co.* (Ky.), 20 R. R. R. 844, 43 Am. & Eng. R. Cas., N. S., 844.

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Same—Joint Action.†—Where an injury is caused by the negligence of a servant acting in the line of his employment, a joint action may be maintained against servant and master, or either may be sued separately.

Error to Circuit Court, Hudson County.

Action by Patrick Whalen against the Pennsylvania Railroad Company and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Argued February term, 1906, before GUMMERE, C. J., and HENDRICKSON and PITNEY, JJ.

James B. Vredenburg, for plaintiff in error.

John J. Mulvaney, for defendants in error.

GUMMERE, C. J. The plaintiff in this action sued the defendant company and one Spencer, an employee of the company, who was a citizen of New Jersey, for injuries received by him while a passenger upon one of the defendant company's ferryboats. Plaintiff had a verdict and judgment against both defendants.

It appears in the case that the Pennsylvania Railroad Company, which is a foreign corporation, before filing its plea herein, applied to the Hudson circuit court for the removal of the case to the United States Circuit Court, that at the same time it presented to the state court a bond in the form and amount required by the federal statute, and that the bond was approved by the presiding judge of the state tribunal. It further appears that, upon application subsequently made to the Hudson circuit court by the plaintiff, an order was made dismissing the petition for removal, upon the ground that it set forth no sufficient reason for removal, and requiring the defendant to plead to the declaration within five days after service of a copy of the order. The first assignment of error attacks the validity of the order dismissing the petition for removal.

The ground upon which the petition for removal was based was "that it appears from the declaration filed in this suit that the alleged injuries were received while said plaintiff was a passenger on a ferryboat of your petitioner, which was in charge of one of its servants, Spencer, who is joined as a co-defendant with your petitioner; that it is not averred that your petitioner was an active party to, or in any way participated in, the alleged negligence of the said Spencer; and hence the alleged negligence of the said Spencer and your petitioner was not joint, and they have, therefore, been improperly joined as defendants in said suit." The petition was properly dismissed. The averment of the declaration was that "the said defendants failed and neglected to use due and reasonable care to carry the plaintiff safely in the said boat under their direction, operation, and management, and

†See foot-notes appended to *Southern Ry. Co. v. Grizzle* (Ga.), 20 R. R. R. 451, 43 Am. & Eng. R. Cas., N. S., 451.

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so negligently and carelessly operated, managed, and controlled said boat that said boat was, through the negligent and careless conduct of the said Pennsylvania Railroad Company and the said Spencer, its servant, employee, and agent, propelled at a high rate of speed against a certain pier or bulkhead, so that said plaintiff, while being carried as a passenger as aforesaid on the said boat of the said defendant company, under the direction and control of the said Spencer, was violently thrown to a deck of said boat, and then and there greatly injured." The negligence alleged is charged to be that of the defendants, and the statement that the boat, at the time of the accident, was under the direction of Spencer, does not negative this allegation. Assuming, however, the construction put upon it by the defendant to be correct, the contention that for this reason the defendants were improperly joined is not tenable. So far as this court is concerned, the rule is settled that, where an injury is caused by the negligence of an agent acting in the line of his employment, the action may be joint against such agent and his principal, or may be separate against either. *Brokaw v. N. J. R. R. Co.*, 32 N. J. Law, 333, 90 Am. Dec. 659; *Newman v. Fowler*, 37 N. J. Law, 90. And this rule has, inferentially, received the approval of the Court of Appeals in the case of *Peterson v. Middlesex & Somerset Trac-tion Co. et al.*, 71 N. J. Law, 297, 59 Atl. 456.

The second assignment of error, which is that a joint action cannot be maintained against an employer and employee under the circumstances set out in the declaration, is disposed of by what has already been said.

The third and fourth assignments of error are directed at the refusal of the trial court to nonsuit and its refusal to direct a verdict for the defendants. The motion to nonsuit was rested upon the ground that the plaintiff's proofs show his injuries to have been caused, to some extent at least, by his own negligence. The motion to direct a verdict was rested upon the same ground, and also upon the further ground that the striking of the boat against a pier was not due to any want of care on the part of those who were operating it, but was caused by "perils of the sea." A recital of the evidence which, it is contended, discloses error in these refusals, will serve no good purpose. It is enough to say in disposing of the assignments, that our examination of the case satisfies us that neither the existence of negligence on the part of the plaintiff nor the absence of negligence on the part of the defendants was made plain by the proofs. Both questions were, therefore, properly left to the jury to be determined.

The judgment under review must be affirmed.

EASTIN & KNOX *v.* TEXAS & P. RY. CO. *et al.*

(Supreme Court of Texas, May 2, 1906.)

[92 S. W. Rep. 838.]

Removal of Causes—Citizenship—Joinder of Parties.—Joinder of a citizen defendant against whom no cause of action is alleged with a noncitizen entitled to remove the cause to the federal courts presents no obstacle to a removal by the latter.

Same—Petition.—Where a cause of action is stated against a citizen defendant alleged to have been fraudulently joined with a noncitizen in order to prevent a removal of the cause by the latter to the federal courts, the petition, in order to entitle the latter to remove, must allege the facts which show that such citizen defendant was joined for the fraudulent purpose of preventing a removal.

Carriers—Connecting Lines—Refusal of Agent to Ship by Shortest Route—Joint Tort-Feasors.*—Where the agent of a railway company wrongfully refused to ship plaintiff's cattle by the shortest and most expeditious route, and by duress compelled plaintiffs to sign a bill of lading under which the cattle were shipped by a longer route, during which they were damaged, the railroad company and the agent were joint tort-feasors, and were suable separately or jointly at plaintiff's election.

Removal of Causes—Citizen Defendant—Petition—Joinder.—Where a noncitizen defendant was joined with a citizen defendant, and both were jointly and severally liable on the cause of action alleged, the fact that the citizen defendant joined in the petition by his codefendant to remove the cause to the federal court did not confer federal jurisdiction on the ground of diverse citizenship.

Appeal—Intermediate Appeal—Determination of Cause—Further Appeal—Extent of Review.—Where a judgment was reversed by the Court of Civil Appeals on the ground that the court erred in denying a petition to remove the cause to the federal courts, without acting on the other assignments of error, such assignments would not be reviewed on a writ of error issued by the Supreme Court until they had been acted on by the Court of Civil Appeals.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by Eastin & Knox against the Texas & Pacific Railway Company and others. A judgment in favor of plaintiffs was reversed (89 S. W. 440), and plaintiffs bring error. Reversed.

Thos. D. Sporer, for plaintiffs in error.

H. C. Shropshire and *West, Chapman & West*, for defendants in error.

*See preceding case, and foot-notes.

Eastin & Knox v. Texas & P. Ry. Co

GAINES, C. J. This suit was brought in the district court of Parker county, Tex., by the plaintiffs in error against the Texas & Pacific Railway Company, a corporation chartered by virtue of an act of the Congress of the United States, and J. M. Tucker, its agent, a resident of the state of Texas, to recover damages alleged to have resulted from the shipment of cattle from Strawn, Tex., a station on the line of the defendant company, destined to Tulsa, Indian Territory, a station on the line of the St. Louis & San Francisco Railway Company. It was alleged in the petition that the cattle were brought to Strawn and were delivered to Tucker, as the agent of the defendant company; to be shipped by the shortest and most expeditious route to the point named; that after the cattle had been about loaded on the cars, Tucker then presented a bill of lading for the transportation of the cattle to Paris, Tex., and thence over the lines of the St. Louis & San Francisco Railway Company to Monette, Mo., and thence to Tulsa. It was alleged that the plaintiffs declined to sign the bill of lading, and demanded that the cattle should be carried over the Texas & Pacific Railroad to Ft. Worth, or to Sherman and thence over the Red River, Texas & Southern Railroad to its connection with the St. Louis & San Francisco Railroad, and thence by that railroad to the point of destination, and that this was the shortest and most expeditious route; but that Tucker, the agent, positively refused to do this, and that under certain circumstances alleged they were compelled to sign as demanded. The circumstances alleged were sufficient in our opinion to show that in signing the bill of lading the plaintiffs acted under duress. It was further averred, in substance, that by reason of the longer haul, the cattle were damaged, and for this damage the suit was brought.

In due time defendant the Texas & Pacific Railway Company filed a petition for the removal of the cause to the Circuit Court of the United States. In this petition its codefendant joined. The defendant company in the first place claimed the right of removal by virtue of its incorporation under an act of the Congress of the United States and, according to the decisions of the Supreme Court of the United States, would clearly have had that right, had it been the sole defendant. It was also alleged in the petition for removal that the defendant Tucker was fraudulently joined as a defendant for the purpose of preventing a removal to the United States Court. Since our opinion the decision of the case in this court depends upon the question of a fraudulent joinder, we copy the allegations in the petition for removal in reference to that matter as follows: "This petitioner says that plaintiffs aver that J. M. Tucker, in shipping the cattle, acted for and was the agent of the Texas & Pacific Railway Company. This petitioner says: That the said Tucker was its local station agent, and acted for it as agent, and not in any other capacity, and was not and is not a proper party to this suit. The plaintiffs do not, in their petition, state any cause of action against him. They im-

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properly and wrongfully joined him with this petitioner in this case for the sole and only purpose of preventing this petitioner, the Texas & Pacific Railway Company, from removing this case to the United States Circuit Court, which said joinder of said J. M. Tucker was done fraudulently for the purpose of preventing said removal and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas. That this suit against this defendant, the Texas & Pacific Railway Company, is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States, approved March 3, 1871, entitled 'An act to incorporate the Texas & Pacific Railway Company, and to aid in the construction of its road, and for other purposes,' and acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874." 16 Stat. 573, c. 122, as amended by 17 Stat. 59, c. 132, 17 Stat. 598, c. 257, and 18 Stat. 197, c. 406. We think it clear, that the joinder of a party in a suit of this character, against whom no cause of action is alleged, presents no obstacle to a removal, by a codefendant, who, if sued alone, would be entitled to remove the case. But as we understand the rulings of the Supreme Court of the United States, where a cause of action is stated against a defendant, who is claimed to be made a party, in order to defeat a removal the petition must allege the facts which show the fraudulent purpose. For example if, in this case, the petition had alleged that the allegation in plaintiffs' petition, that Tucker was the agent of the defendant company in shipping the cattle, was not true and was fraudulently inserted in order to prevent a removal of the cause, it would have carried the case to the United States Court, where, upon a denial of the fraud by the plaintiffs and a motion to remand, the issue would have been tried and determined. *Louisville, etc., R. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *Chesapeake Ry Co v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. But the petition for removal in this case contains no allegation of any fact whatever from which the conclusion can be reached that defendant Tucker was fraudulently joined as a defendant. The statement of a conclusion of law is not sufficient. Therefore, if the petition of the plaintiff states a case which shows a cause of action against the defendant Tucker, which case could be properly joined with the action against the defendant company, the petition for removal was not sufficient to deprive the state court of its jurisdiction. It seems to us therefore the questions to be determined are: Does the plaintiff's petition state a cause of action against defendant Tucker? and was the plaintiff entitled to sue both defendants in the same suit? The first is the important question in the case here presented.

Where the agent is empowered to perform a duty for his prin-

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cipal, and neglects to perform it, and damage accrues from the failure, the agent is not responsible, though the principal may be. *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278. But where the agent acting for his principal does a wrongful act and damage results to a third person, both are responsible. *Baker v. Wasson*, 53 Tex. 150. That there was a liability in the case made by the plaintiff's petition, we have no doubt. The wrongful act was done by Tucker, the agent, and for his act not only was he liable but his principal was liable because it was done in the prosecution of the company's business. They were joint tort-feasors, and were suable separately or jointly at the election of the plaintiff. That defendant Tucker could not give the United States Circuit Court jurisdiction of the case by joining in the petition of its co-defendant we have this day decided in the case of the Texas & Pacific Railway Company against Huber.

The Court of Civil Appeals, as they had the right to do, in the exercise of a sound discretion, when they reached the conclusion that the jurisdiction had been taken away, declined to pass upon the merits of the appeal. Until they have acted upon the other assignments of error in that court, we cannot determine the case. *Oriental Investment Co. v. Barclay*, 93 Tex. 425, 55 S. W. 1111.

Therefore the judgment of the Court of Civil Appeals will be reversed, and the cause remanded to that court for a decision of the other questions presented by the appeal.

LOUISVILLE & N. R. Co. v. GILLEN.

(Supreme Court of Indiana, March 16, 1906.)

[76 N. E. Rep. 1058.]

Master and Servant—Negligence of Servant—Master's Liability.*—

A master is not liable for the acts of his servant, committed outside the line of his duty and not connected with his master's business, though the particular injury could not have occurred without the facilities afforded by the relation of the servant to his master.

Same—Pleading—Complaint.—In an action by a servant for injuries, owing to a sliver having blown from a hammer that was in use by another servant, the complaint was insufficient for failing to show that the act of the other servant was done in the line of his duty.

Appeal from Superior Court, Vanderburgh County; Jno. H. Foster, Judge.

Action by Henry Gillen against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

*See foot-notes appended to *Sharp v. Erie R. Co.* (N. Y.), 19 R. R. R. 683, 42 Am. & Eng. R. Cas., N. S., 683; *Palos Coal & Coke Co. v. Benson* (Ala.), 19 R. R. R. 185, 42 Am. & Eng. R. Cas., N. S., 185.

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Gilchrist & De Bruler, for appellant.*Van Pelt & Monfort* and *G. V. Menzies*, for appellee.

MONTGOMERY, J. This cause was transferred from the Appellate Court under the the provisions of section 1337u, Burns' Ann. St. 1901. This action was brought by appellee to recover damages for a personal injury received while in appellant's employ. It is alleged that the court below erred in overruling (1) appellant's demurrer to the first paragraph of complaint, (2) its demurrer to the first paragraph of complaint, and (3) its motion for a new trial. The sufficiency of the first paragraph of complaint is not seriously questioned, and in our opinion no error was committed in overruling appellant's demurrer to the same.

The substantial averments of the second paragraph of complaint are as follows: That the appellant on "the 3d day of January, 1902, owned and operated at the town of Howell, on the line of its railroad, in the state of Indiana, machine and repair shops, where engines, cars, and other equipments of said company's railroad were manufactured and repaired. That on said date plaintiff was in the employ of said company at and in one of the buildings of said shops as a sweeper. That plaintiff's duties as such sweeper were to sweep the floor of the boiler room of said building. That at the time aforesaid defendant had and operated in said boiler room work benches, to which iron vises were attached, in which vises pieces of metal were fastened for the purpose of being hammered with hammers. That at the time aforesaid defendant negligently and carelessly permitted a defective and unsafe hammer to be in use at one of said benches, which said hammer had been for a long time prior thereto, and on said day was, used in said defective and unsafe condition. That said hammer was defective and unsafe in this, to wit: said hammer was tempered too hard, was extremely brittle, and the edges thereof were sharp and improperly dressed. That the defective and unsafe condition of said hammer was at that time known to said company and unknown to the plaintiff. That at the time aforesaid plaintiff, while in the proper discharge of his duties as such sweeper, was walking in and about one of said benches, to which there was a vise attached, in which vise there was at that time a piece of metal screwed. That one of the employees of said company was at the time engaged in hammering on the piece of metal in said vise, and in doing said hammering was using the said defective and unsafe hammer, which was unknown to the plaintiff. That while plaintiff was at and near said bench, and in the performance of his duties as aforesaid, and while said hammer was being used as aforesaid, a piece or sliver of steel suddenly and violently broke off said hammer, as said hammer came in contact with said metal, which piece or sliver off said hammer entered plaintiff's right eye with great force and violence, entirely destroying the same. That by reason of the injury to said eye it was necessary to remove it, and the same was removed. That by reason of said injury the vision of plaintiff's left eye has become

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seriously impaired and his mentality affected. That the injury herein complained of was caused by the negligence of said company in failing to provide and keep for use a safe hammer in and about where plaintiff was required to perform his duties, and in suffering and permitting to be used in manner as aforesaid, at the time aforesaid, in its said boiler room, at the place plaintiff was required to work, the said defective and unsafe hammer."

It is contended by appellant that this paragraph of complaint is fatally defective for the want of an averment that the employee who was using the hammer at the time of the accident was in the line of his duty as a servant of the appellant or engaged in the prosecution of the master's business. It is manifest that there was no latent peril in the mere presence of the inert hammer, alleged to have been defective; but the danger arose from a particular use of the instrument. The liability, if any, in this action, must be predicated upon the use in its business of a defective tool, authorized either expressly or impliedly by appellant. It is averred in this paragraph of complaint merely that at the time of the accident one of the appellant's employees was hammering a piece of metal in a steel vise with this defective tool. The duties of this employee and the purpose of the hammering are not stated, nor is it averred in general terms that the work in which he was engaged was in the line of his duty under his employment. The averments of the complaint should show that the act of the servant resulting in the injury complained of was done while in the discharge of his duties and performing service for the master. If the offending employee was not acting in the line of his duty and within the scope of his authority, there can be no liability against the employer. It is a well settled principle of law that a master is not answerable for the acts of his servant committed outside the line of his duty and not connected with his master's business, but done in pursuit of some independent purpose of his own, although the particular injury could not have occurred without the facilities afforded by the relation of the servant to his master. *Louisville, etc., Ry. Co. v. Palmer*, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400; *Harrell v. Cleveland, etc., R. Co.*, 27 Ind. App. 29, 60 N. E. 717; *Pittsburgh, etc., R. Co. v. Adams*, 25 Ind. App. 164, 56 N. E. 101; *Cincinnati, etc., R. Co. v. Voght*, 26 Ind. App. 665, 60 N. E. 797; *Helfrich et al. v. Williams*, 84 Ind. 553; *Smith v. Louisville, etc., R. Co.*, 124 Ind. 394, 24 N. E. 753; *Lima R. Co. v. Little (Ohio)* 65 N. E. 861; *Johanson v. Pioneer Fuel Co. (Minn.)* 75 N. W. 719; *Canton, etc., Co. v. Pool*, 78 Miss. 147, 28 South. 823, 84 Am. St. Rep. 620; *Goodloe v. Memphis, etc., R. Co.*, 107 Ala. 233, 18 South. 166, 29 L. R. A. 729, 54 Am. St. Rep. 71; *Guille v. Campbell*, 200 Pa. 119, 49 Atl. 938, 55 L. R. A. 111, 86 Am. St. Rep. 705; *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; *Branch v. International, etc., R. Co.*, 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844; *Walker v. Hannibal, etc., R. Co.*, 121 Mo. 575, 26 S. W. 360, 24 L. R. A. 363, 42 Am. St. Rep. 547; *Stephen-*

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son *v. Southern Pac. Co.*, 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 575, 27 Am. St. Rep. 223; Elliott on Railroads, § 1303.

The absence of averments showing that the act of appellant's employee resulting in appellee's injury was done in line of duty or while performing any service required under his employment renders the second paragraph of complaint insufficient, and the court erred in not sustaining the demurrer thereto for want of facts. This error requires the reversal of the judgment, without consideration of the ruling on the motion for a new trial.

The judgment is reversed, with directions to sustain appellant's demurrer to the second paragraph of complaint.

ARKADELPHIA LUMBER CO. v. SMITH.

(Supreme Court of Arkansas, April 23, 1906.)

[95 S. W. Rep. 800.]

Master and Servant—Injuries to Servant—Scope of Employment.*—

Where defendant lumber company furnished its employees with a hand car on which to transport themselves to their homes at the end of each day's labor, such employees were still in the lumber company's service while traveling over its road to their homes.

Same—Operation of Railroad—Ownership.†—Where a logging road was used by defendant lumber company in connection with a railroad for the transportation of logs to its mill, and the lumber company furnished a hand car to its employees, with which they were permitted to travel over such logging road to their homes at the termination of each day's work, the lumber company was liable to such employees for the proper maintenance of the road in the same manner and to the same extent as though the road belonged to and was controlled by it, instead of by the railroad company.

Same—Maintenance of Railroad—Care Required.‡—Though a master is not bound to exercise the same degree of care in maintaining

*For the authorities in this series on the question, who are, and are not, the employees of a railroad company, see foot-notes appended to *Chicago, etc., R. Co. v. Weber* (Ill.), 19 R. R. R. 34, 42 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Chicago, etc., Ry. Co. v. Hamler* (Ill.), 19 R. R. R. 252, 42 Am. & Eng. R. Cas., N. S., 252; foot-notes appended to *Norfolk & W. Ry. Co. v. Bell* (Va.), 19 R. R. R. 263, 42 Am. & Eng. R. Cas., N. S., 263; *Weisser v. Southern Pac. Ry. Co.* (Cal.), 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861; *Baker's Adm'r v. Lexington & E. Ry. Co.* (Ky.), 20 R. R. R. 223, 43 Am. & Eng. R. Cas., N. S., 223.

†See note appended to *Story v. Concord & M. R. R.* (N. H.), 20 Am. & Eng. R. Cas., N. S., 90.

‡For the authorities in this series on the subject of logging railroads, see foot-notes appended to *Kent Lumber & Brick Co. v. Tax Assessor* (La.), 18 R. R. R. 446, 41 Am. & Eng. R. Cas., N. S., 446; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232; *McKivergan v. Alexander & Edgar Lumber Co.* (Wis.), 15 R. R. R. 372, 38 Am. & Eng. R. Cas., N. S., 372.

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a logging road as is demanded in the construction of railway tracks in use by common carriers, it is required to so construct and maintain the same as to render it secure to its employees using the same in the course of their employment.

Same—Defects—Notice.—A logging road had been laid but a short time before plaintiff was injured while traveling over the same on a hand car in the course of his employment. An old rail, with six or eight inches of the ball broken off, was used in the construction, which rail was worse than the other rails used on the track, and caused a low joint, resulting in the derailment of a hand car on which plaintiff was riding. Held, that defendant was chargeable with notice of the defect and was liable for plaintiff's injuries proximately caused thereby, without any previous knowledge or notice thereof.

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

Action by Oscar Smith against the Arkadelphia Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Crawford and Webber & Webber, for appellant.

Smead & Powell and McMillian & McMillian, for appellee.

BATTLE, J. On the 15th day of October, 1900, Oscar Smith was seriously injured while in the service of the Arkadelphia Lumber Company. He brought this action against the lumber company to recover damages sustained by reason of the injuries.

The lumber company is a corporation and owned and operated a saw and planing mill at Daleville, in Clark county, in this state, on or near the railroad of the Ultima Thule, Arkadelphia & Mississippi Railroad Company and was engaged in the manufacture of lumber. A lateral railroad was constructed from the main line of the railroad company to and in the timber lands of the lumber company, and was used in transporting logs from the lands of the lumber company to its mill to be manufactured into lumber. Its track was temporarily laid, and in such manner as to be removed to the timber of the lumber company on different tracts of land with the least expense. Plaintiff and many others were employed by the defendant and were engaged in hauling logs to various places on the lateral railroad by means of teams and wagons.

The evidence in this case tended to prove that the defendant owned and furnished railroad hand cars to its teamsters, at the close of the day, to convey them from their work to their respective homes over the railroad; and that it was understood when a teamster was employed he would be furnished with a hand car for such a purpose, and it was so understood when plaintiff was employed; and that when the lateral road was constructed it furnished such cars to its teamsters for transportation over it to their homes after each day's work was done.

On the 15th day of October, 1900, the defendant furnished

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plaintiff and four other teamsters with a hand car to carry them to their homes over the lateral road. They boarded the same and were propelling it over the lateral road at the rate of six or eight miles an hour when it ran off the track and violently threw the plaintiff to the ground and seriously injured him. There was evidence tending to prove that, at the place where the accident occurred, the track of the lateral road had been recently laid, and an old rail, worse than the other rails on the track, with the ball or T thereof broken off for eight or ten inches, formed a part of the track at the time it was laid, and that there was a low joint in this part of the track; all of which was a defect in the construction of the track. There was also evidence tending to prove that this defect was unknown to the plaintiff at the time of the accident, and that he was making his third trip over the same when he was injured.

D. B. Hart testified that he was a track layer on the lateral road at the time plaintiff was injured, and as such was in the employment of the defendant.

W. E. Hubbard testified that he was an engineer operating an engine on the lateral road, and was in the employment of the defendant and of the Ultima Thule, Arkadelphia & Mississippi Railroad Company.

The court instructed the jury, at the request of plaintiff, over the objections of the defendant, in part, as follows:

No. 1. "If you find from the testimony that the hand car and roadbed were furnished plaintiff by defendant or by defendant's foreman, Will Richardson, then the source of its title to said roadbed, whether owned by the defendant, leased, borrowed, or otherwise placed in his possession for use, is wholly immaterial. As between plaintiff and defendant the roadbed is the property of the defendant."

No. 2. "It was the duty of the defendant to exercise ordinary care and diligence to provide a reasonably safe track at this place for the use of the plaintiff, and if it failed to perform that duty, and plaintiff was injured by reason of such failure, then the plaintiff may recover, unless, he was guilty of negligence which contributed to his injury, or knew or ought to have known of the defects of the track before attempting to use it."

No. 3. "If, under all the circumstances which surrounded the plaintiff at the time of the accident, he ought to have observed and comprehended the danger of a defective rail and joint, if the same were defective, before using it, then he assumed the risk in that condition and cannot recover. The fact that he might know of the defects, or that he had means of knowing them, will not preclude him from recovery, unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them."

And refused to instruct the jury, at the request of the defendant as follows:

No. 1. "It is admitted in this case, that the Ultima Thule, Arka-

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delphia & Mississippi Railway Company and the Arkadelphia Lumber Company are separate and distinct corporations, incorporated by and under the laws of this state, and the plaintiff must be held to a knowledge of the fact that the railway company and not the lumber company was operating the railroad, and in going upon said road in a hand car he assumed all the risk arising therefrom."

The jury returned a verdict in favor of the plaintiff for \$3,000, and the defendant appealed.

While appellee was going home, after his day's labor was done, he was still in the service of the appellant. He was traveling in a hand car furnished by appellant according to their implied contract; and the duties of the one to the other for the day, as master and servant, were not fully discharged. *Gilman v. E. R. Corp.* (Mass.) 87 Am. Dec. 635; *Gillshammon v. S. B. R. Corp.*, 10 Cush. (Mass.) 228; *Seaver v. B. & M. R. R. Co.*, 14 Gray (Mass.) 466; *Ryan v. Cumberland, etc., R. R. Co.*, 23 Pa. 384; *Ewald v. Chicago, etc., R. R. Co.* (Wis.) 36 N. W. 12, 591, 5 Am. St. Rep. 178; *Packet Co. v. McCue*, 17 Wall. (U. S.) 508, 21 L. Ed. 705.

Appellant furnished to appellee the hand car and the portion of the lateral railroad used by him at the time he was injured. D. B. Hart was its track layer, and as such it was his duty to "keep up" the lateral road at the time appellee was injured.

D. E. Hubbard, the engineer who hauled logs over the same, was jointly employed by it and the railroad company. Appellant owned and kept hand cars to be used on the lateral road by its teamsters, and it was understood by it and them that it would furnish them with a hand car to convey them over the same, from their work to their homes. This was one of the inducements to them to engage in its service. Under the circumstances, when it furnished them with a hand car to be used on the lateral road, it became bound and liable to them in the same manner and to the same extent it would had the road belonged to and been controlled by it. It assumed the same duties and liabilities. *L. R. & Ft. Smith Ry. v. Cagle*, 53 Ark. 347, 14 S. W. 89; *Arkansas Central Railroad Company v. Jackson*, 70 Ark. 295, 67 S. W. 757; *Stetler v. Chicago & Northwestern Railway Co.*, 49 Wis. 609, 6 N. W. 303.

"Although a 'logging' road," it is said, "is not expected or required to be laid with the same care and security, or to be as solid and complete as is demanded in the construction of railway tracks in use by common carriers, nevertheless it should be so constructed and operated as to render it secure to those whose employment necessitates their going upon such road and performing service in connection with the same." *Lynn v. Lumber Co.*, 105 La. 455, 29 South. 875; 6 Thompson's Commentaries on Negligence, §§ 4254, 4275, 4276.

In this case, the evidence tended to prove that the portion of the track where the accident occurred was laid a short time be-

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fore the injury; that an old rail with six or eight inches of the ball broken off was used in its construction, and that this rail was "worse than the other rails on the track—crumbled, caused a low joint." The jury might reasonably have inferred from the evidence that the defect in the track was made by the construction of it and not by usage, and that it was the proximate cause of the accident and injury. In that event the appellant was chargeable with notice of the defect, and liable to its employees injured on account thereof without any previous notice or knowledge of the same.

We find no reversible error in the giving and refusing instructions.

The evidence is sufficient to sustain the verdict.
Judgment affirmed.

HUGGINS v. SOUTHERN RY. CO.

(Supreme Court of Alabama, June 13, 1906.)

[41 So. Rep. 856.]

Master and Servant—Injuries to Servant—Action—Pleading—Plea—Sufficiency.—In an action for injuries to a brakeman defendant filed a plea that plaintiff was guilty of contributory negligence, in that, having contracted with defendant that under no circumstances would he couple cars except with a stick, in violation thereof he went between cars to couple them without a stick, when he was injured. Plaintiff demurred to the plea on the grounds that it set forth a contract and alleged a violation thereof, yet the facts set out did not show a violation; that the plea failed to allege that the coupling could have been made with a stick; that the coupling could not have been made without going between the cars; that the plea failed to show that plaintiff knew that an engine was attached to a train of cars and was approaching when he went in between the cars; that the contract relied on was in contravention of Code 1896, § 1749, in relation to the liability of employers for negligence, and opposed to public policy; that the plea showed on its face that it was an arbitrary rule to require one seeking employment to sign a contract such as the one in question, it being a fraud for the purpose of escaping liability for injury; and that the plea failed to specify the facts which constituted plaintiff's negligence. Held, that the plea was not subject to such grounds of demurrer.

Same.—In an action against a railroad for injuries to a brakeman, a plea charging that plaintiff went in between cars to make a coupling when it was unnecessary, and that his going between the cars was the proximate cause of his injury, was good.

Same—Replication.—In an action for injuries to a brakeman, a plea alleged contributory negligence in going between cars to make a coupling when it was unnecessary, and that such going between

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the cars was the proximate cause of the injury. Plaintiff replied that the coupling could not have been made without going between the cars and that plaintiff had been ordered to make the coupling by his superior employee. Defendant demurred to the replication on the ground that it was not alleged that defendant's employee who ordered plaintiff to make the coupling had any right to abrogate the rule prohibiting employees from going between cars to couple them, and that the fact that it was necessary for him to go between the cars to make the coupling did not authorize the breaking of the rule. Held, that the demurrer was properly sustained, because of the failure of the replication to show that the order was given by one who had authority to order a violation of the rule.

Pleading—Amendments—Complaint.—The only limitation upon the right of plaintiff to amend the complaint at any time before the cause is finally submitted to the jury is that the form of the action must not be changed and that there must be no substitution of a new cause of action.

Appeal—Harmless Error—Pleadings—Amendments.—Error in denying an amendment to a complaint is harmless, if the amendment is but a repetition of matter in the original complaint.

Pleading—Amendments—Complaint.—Where, in an action for injuries to a brakeman, the negligence charged in the original complaint on the part of a superior employee was that he negligently ordered plaintiff to couple certain cars and signaled the engineer to back up while plaintiff was between the cars, and there was also an allegation of wantonness on the part of the superior, it was not error to permit an amendment setting up that the superior negligently allowed the cars to run back, as it was no repetition or substitution of the original complaint.

Master and Servant—Injuries to Servant—Question for Jury.—In an action for injuries to a brakeman, held a question for the jury whether there was negligence on the part of plaintiff's superior employee in failing to signal the engineer to stop or slacken the speed of the engine and cars before striking detached cars while plaintiff was between them endeavoring to make a coupling.

Evidence—Opinion Evidence—Mechanical Devices.*—In an action for injuries to a brakeman, it was proper to permit a railroad man to give an opinion as to what cars could be coupled without going between them.

Witnesses—Cross-Examination—Scope.—Where, in an action for injuries to a brakeman while coupling cars, a witness for plaintiff had testified on direct examination as to what cars could be coupled without going between them, defendant had the right to the opinion of

*For the authorities in this series on the subject of the admissibility of expert testimony and opinion evidence, see foot-notes appended to *Wallace v. North Alabama Trac. Co.* (Ala.), 19 R. R. R. 804, 42 Am. & Eng. R. Cas., N. S., 804; *Rietveld v. Wabash R. Co.* (Iowa), 19 R. R. R. 181, 42 Am. & Eng. R. Cas., N. S., 181; foot-notes appended to *Warren v. City Elec. Ry. Co.* (Mich.), 19 R. R. R. 164, 42 Am. & Eng. R. Cas., N. S., 164; *Louisville & N. R. Co. v. Molloy's Adm'r* (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714.

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the witness on cross-examination as to whether it was necessary to go between the cars in question.

Master and Servant—Injury to Servant—Evidence—Cause of Injury.—In an action for injuries to a brakeman while between cars endeavoring to couple them, there was no error in permitting a witness to testify as to the condition of certain cars and in permitting him to describe the couplings; it appearing that the numbers of such cars corresponded with the two between which plaintiff was injured, as identified by another competent witness.

Same—Contributory Negligence—Disobedience of Orders.†—In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify as to what he told plaintiff about going between cars the day he started to work, and of his calling plaintiff's attention to rules whereby servants were forbidden to go between cars.

Evidence—Opinion Evidence—Mechanical Devices.—In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify that the cars could have been coupled without plaintiff going between them.

Same—Admissions—Acquiescence.—In an action for injuries to a servant, there was no error in admitting in evidence a statement in regard to the accident, though it was not signed by plaintiff, where one who had signed it testified that, while plaintiff declined to sign it, it was read over to him and he admitted that it was correct.

Trial—Instructions—Conformity to Evidence.—Where, in an action for injuries to a servant, there was no evidence of wantonness on the part of plaintiff's superintendent growing out of any act or omission set out in the complaint, it was proper to refuse a requested instruction to the effect that, though defendant was only charged with simple negligence, yet, if evidence had been introduced without objection showing defendant guilty of wanton or willful negligence on account of the acts of plaintiff's superintendent, the variance might be disregarded and a verdict rendered for plaintiff on account of the willful negligence.

Master and Servant—Injury to Servant—Instructions—Proximate Cause.—In an action against a railroad for injuries to a brakeman, plaintiff requested an instruction to the effect that if the cars between which plaintiff was injured were in a defective condition, and defendant knew of the defects and failed or refused to put the cars in good condition within a reasonable time, plaintiff was entitled to recover.

†For the authorities in this series on the subject of contributory negligence and assumption of risks where employees fail to comply with the master's rules and orders, see foot-note appended to *Baltimore & O. R. Co. v. Doty* (C. C. A.), 17 R. R. R. 753, 40 Am. & Eng. R. Cas., N. S., 753; foot-note appended to *Illinois Cent. R. Co. v. Stiths Adm'x* (Ky.), 16 R. R. R. 729, 39 Am. & Eng. R. Cas., N. S., 729; foot-notes appended to *Moore v. St. Louis, etc., Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232.

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Held, that the instruction was properly refused as seeking to recover, irrespective of whether the defect was the proximate cause of the injury.

Same—Injuries to Servant—Orders—Effect.—Where the rules of a railroad company prohibited brakemen from going between cars to couple them, an order to a brakeman from his superintendent to couple certain cars was no implied order to go between them.

Damages—Personal Injuries.—In an action for injuries to a servant, a requested instruction that in case of defendant's guilt plaintiff was entitled to recover what his services had been proven to be worth from the time of his injury to the time he might reasonably expect to live, less what he could earn in his present condition, was properly refused.

Same.—In an action for injuries to a servant, it was proper to refuse an instruction that one element of damages was wounded feelings of the plaintiff, his physical and mental suffering, and that, while there was no measure of proof of such damages, it was a matter of inference to be drawn by the jury from the manner and carelessness of the wrong.

Master and Servant—Proximate Cause of Injuries—Contributory Negligence.‡—Where a brakeman was negligent in going between cars while in motion, he could not recover for injuries, though the engineer was negligent in backing the cars at an unusual and excessive speed.

Same—Instructions—Wanton Negligence of Fellow Servant—Contributory Negligence.§—It was proper to charge that unless the engineer was guilty of willful or wanton negligence in backing his engine and cars at a great and dangerous speed, and was conscious of the fact at the time that his act was likely to result in an injury to plaintiff, plaintiff could not recover for the negligence of the engineer.

Trial—Instructions—Failure of Evidence on Certain Points.—In an action for injuries to a servant while between cars endeavoring to couple them, it was not reversible error to instruct that there was no evidence that any custom among brakemen of going between moving cars was known to and acquiesced in by defendant, and that there was no evidence that the rule prohibiting employees from going between moving cars to couple them had been rescinded or abandoned.

Master and Servant—Rules of Employment—Reasonableness.—A rule of a railroad company prohibiting employees from going in between moving cars to couple or uncouple them while in motion is reasonable.

‡For the authorities in this series on the question whether contributory negligence on the part of an employee will prevent recovery against his master for his injuries or death, see foot-notes appended to *Sanders v. Central of Georgia Ry. Co. (Ga.)*, 18 R. R. R. 7, 41 Am. & Eng. R. Cas., N. S., 7.

§For the authorities in this series on the question whether an engineer is the fellow servant of the other members of his train crew, see foot-note appended to *Shugart v. Atlanta, etc., Ry. (C. C. A.)*, 17 R. R. R. 558, 40 Am. & Eng. R. Cas., N. S., 558.

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Same—Contributory Negligence—Operation of Railroad.**—Where a rule of a railroad prohibited employees from going between moving cars to couple them, a brakeman was guilty of contributory negligence in going between moving cars if the cars could have been coupled without his so doing.

Same—Negligence of Fellow Servant—Acts Constituting Negligence—Proximate Cause.**—Where a brakeman signaled the engineer to back his train while the brakeman was standing on the outside of the track, and the engineer backed the train in the approved manner, and before the cars reached those to which they were to be coupled the brakeman went in between them, and as soon as the engineer discovered such fact he used every means to stop his train, but was unable to do so in time to avoid injuring plaintiff, plaintiff could not recover.

Same—Proximate Cause.—Where an engineer, in moving cars, was taking his signals from a brakeman, and did not see any signals given by a superintendent, and the brakeman was injured by being caught between the cars, he could not recover for any negligence of the superintendent.

Same—Rules—Customary Violation.††—Where it was contrary to the rules of a railroad for employees to go between cars in order to make couplings, a custom among the employees violative of the rule was not binding upon the road, unless it was known to the road, and acquiesced in, or had prevailed for so long a time that the road was bound to know it.

Appeal from City Court of Bessemer; B. C. Jones, Judge.
"To be officially reported."

Action by Joseph Huggins against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

This was an action by appellant, who sues under the employer's liability act for damages received while coupling cars in defendant's yards at Selma. The first count avers a defect in the ways, works, plant, and machinery, etc. The second count avers the negligent order of one Porterfield, as superintendent, while in the exercise of such superintendence. The third count avers the negligence of said Porterfield, while in the exercise of superintendence, in negligently giving the engineer signal to back up the

**For the authorities in this series on the subject of contributory negligence of and assumption of risk by those engaged in coupling or uncoupling cars, see foot-notes appended to *St. Louis S. W. Ry. Co. v. Pope* (Tex.), 16 R. R. R. 736, 39 Am. & Eng. R. Cas., N. S., 736; foot-notes appended to *Taylor v. Boston & M. R. R.* (Mass.), 16 R. R. R. 397, 39 Am. & Eng. R. Cas., N. S., 397; *Brinkmeir v. Missouri Pac. Ry. Co.* (Kan.), 15 R. R. R. 349, 38 Am. & Eng. R. Cas., N. S., 349.

††For the authorities in this series on the subject of the waiver of rules made for the guidance and protection of railroad employees, see foot-notes appended to *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621.

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train at a great rate of speed while the plaintiff was coupling cars. The fourth count is a practical repetition of the third count. The fifth count attributes the negligence to R. O. Harris, the engineer in charge of the train, in negligently running the engine back against the cars at a great rate of speed. The sixth count is a repetition of the fifth count.

The defendant filed a number of pleas, among them the following: Plea 6: "The defendant for further answer to the first, second, third, and fifth counts of the complaint, says that the plaintiff was himself guilty of contributory negligence in this: That said plaintiff, under the name of Alex Huggins, on March 30, 1901, entered into a contract of employment with the defendant, which said contract was in words and figures as follows: [Here follows the contract of employment, which provides that under no circumstances shall the brakeman couple or uncouple cars except with a coupling stick, and that no brakeman or others must go between cars under any circumstances for the purpose of uncoupling, or for adjusting pins, where the engine is attached to the car, and assuming the individual duty of going to the railroad company and procuring a coupling stick of sufficient standard length, and of keeping such a stick always on hand. The contract further provides that he will not, in obedience to any orders from anybody, couple without this stick, and no one has any authority to discharge him for failure to couple without this stick.] And defendant says that in violation of the above contract the plaintiff negligently went in between the cars of the train, when he was injured, and negligently attempted to make a coupling without a stick, and while one section of said car was in motion, and was thereby guilty of contributory negligence." Plea 8 sets up contributory negligence on the part of the plaintiff for violation of a rule of the company prohibiting employees from getting in between moving cars to couple or uncouple them, with a knowledge of said rule. Plea 9 sets up contributory negligence, because plaintiff went in to couple cars when the cars were in motion, and it was unnecessary to go in to make the coupling. Pleas 8 and 9 were filed to the first, second, third, and fifth counts of the complaint.

Demurrers to the sixth plea: "Said plea set forth a contract, and alleges a violation thereof, and yet the facts set out are not sufficient to show a violation. Said plea fails to aver or show that the coupling which plaintiff was making or attempting to make could have been made with a stick. Said plea fails to show that the coupling of the cars which the plaintiff was making or attempting to make when he was injured could be done without going in between the cars. Said plea fails to show that plaintiff knew that an engine was attached to the train or cars and was approaching when he went in between the cars to make the coupling. Said plea sets up a contract which is in contravention of section 1749 of the Code, opposed to public policy. Said plea shows on its face that it is an arbitrary rule of the defendant to

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require any one who desires to obtain employment with the defendant to sign one of the contracts as set out in the plea, not as a contract to be governed by while the employee is working for defendant, but as an artful scheme and a fraud, for the purpose of trying to escape liability in case of personal injury to the employee. Said plea fails to show or specify the facts which constituted the negligent act of plaintiff in violation of said contract."

Demurrers to eighth plea: "Said plea fails to allege that it was unnecessary for plaintiff to go between the cars to couple the same. Said plea fails to aver that the rule therein named was violated. Because the averments in said plea vary the obligation in said contract the plaintiff would not go in between the cars for the purpose of coupling or uncoupling them when an engine is attached. The facts set out in said plea do not show any violation of the rule alleged in the plea. The plea fails to aver that the coupling in which plaintiff was engaged could be made with a stick. The plea fails to aver that the coupling could be made without plaintiff going in between the cars. It does not allege that there was an engine attached to the cars that plaintiff went in between. Because said plea varies said rule of defendant. Because said plea does not show that plaintiff knew, when he went in between the cars, that an engine was attached to other cars approaching the one which plaintiff was to couple, and does not show that plaintiff had knowledge of the fact that it was unnecessary for him to go between said cars to couple the same. Said plea does not aver or show that going in between the cars was obviously dangerous, or that plaintiff knew it was dangerous."

The third replication to the eighth and ninth pleas was as follows: "Plaintiff says that the coupling the plaintiff was making at the time of the injury to him could not be made without going between the cars, and that plaintiff had been ordered by his superior employee to make said coupling, and in order to do so it was necessary for plaintiff to go between the cars."

The defendant demurred to this replication as follows: "It is not averred that the defendant's employee who ordered plaintiff to make said coupling had the right or authority to annul or abrogate the rule prohibiting employees from going between moving cars for the purpose of coupling or uncoupling them, and the fact that it was necessary for plaintiff to go in between said cars for the purpose of making said coupling did not authorize or justify him in the breaking of the rule of defendant prohibiting employees going in between moving cars to couple or uncouple them."

The plaintiff requested the following charges, which were refused by the court: Charge 7: "I charge you, gentlemen of the jury, that the law is this: If the defendant corporation is only charged in the complaint with simple negligence, on account of the negligence of the yard foreman, Porterfield, yet if evidence was introduced by the plaintiff, without objection on part of the defendant, showing that defendant was guilty of wanton or willful

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negligence on account of the acts of Porterfield, and you believe such evidence, then you are warranted under the law in disregarding the variance, and may give a verdict for plaintiff on account of the willful or wanton negligence of said Porterfield." Charge 10: "I charge you, gentlemen of the jury, that if you believe from all the evidence in the case that the car or cars between which Joe Huggins was injured were in a defective condition, and the defendant knew of these defects, and failed or refused to put said car or cars in good condition within a reasonable time, then the defendant is guilty of negligence, and plaintiff is entitled to recover." Charge 11: "I charge you, gentlemen of the jury, that if you believe from all of the evidence in this case that poor Joe Huggins cannot read or write, and that the contract in evidence was not read over to him and fully explained to him, and if you believe further from the evidence that Huggins did not read over said contract in the presence of Walter Huggins, as set up in said contract, then the plaintiff is not bound by the contract, and you may disregard the same in making up your verdict." Charge 12: "I charge you, gentlemen of the jury, that if you believe from all the evidence in this case that Porterfield was standing near Huggins and could see his perilous position, and failed to use ordinary care to stop said cars or signal the engineer, and the injury to plaintiff resulted thereby, then plaintiff may recover, although plaintiff may have been guilty of contributory negligence in going between said cars." Charge 13: "I charge you, gentlemen of the jury, that if you believe from all the evidence in this case that poor Joe Huggins could not read or write, and that the yard foreman, Porterfield, failed to read over to said Huggins rule No. 10 of defendant, in evidence in this case, and failed to fully explain said rule to said Huggins, then said Huggins is not bound by this rule, and you may disregard the same in making up your verdict." Charge 14: "I charge you, gentlemen of the jury, if you believe from all of the evidence in this case that poor Huggins could not read or write, and that he did not read over said rule 10 in the presence of the yard foreman, Porterfield, as set up in said plea, then Huggins would not be bound by said rule, and you may disregard the same." Charge 16: "I charge you, gentlemen of the jury, that if you believe from all the evidence in this case that Joe Huggins gave the engineer, Harris, the proper signal, and the engineer failed to obey said signal, and thereby the plaintiff was injured, then the plaintiff is entitled to recover." Charge 17: "I charge you, gentlemen of the jury, that if you believe from all of the evidence in this case that the plaintiff, who was a switchman on defendant's road, gave the proper signals to Porterfield, whose duty it was to receive them and transmit the said signals to the engineer, and Porterfield failed to transmit them properly, and injury resulted to plaintiff, the defendant is, under statutory provisions, liable for damages." Charge 18: "I charge you, gentlemen of the jury, that if you believe from the evidence in this case that Porterfield told Huggins to couple or uncouple said

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cars, then impliedly it was an order to go between said cars and couple them, and plaintiff, in order to recover, is not bound to prove that he had a special order from Porterfield to go between said cars." Charge 20: "I charge you, gentlemen of the jury, that if you find the defendant guilty the plaintiff, Huggins, is entitled to recover what his services have been proven to be worth from the time of his injury up to the time he may reasonably expect to live, less what he can earn in his present condition." Charge 21: "I charge you, gentlemen of the jury, that one element of damages in this case is the wounded feelings of the plaintiff, his physical and mental suffering from his injuries. There is no measure of proof of such damages. It is a matter of inference, to be drawn by the jury from the manner and carelessness of the wrong."

The court gave the following charges at the request of defendant: Charge 12: "Unless the jury believe from the evidence that Porterfield gave his signal to the engineer to back up said cars, with the knowledge of, or conscious of, the fact that plaintiff was in a dangerous and perilous position, and that the probable result of the cars backing up would be to injure him, then the plaintiff cannot recover under the fourth count of the complaint." Charge 14: "I charge you, gentlemen of the jury, that even if R. O. Harris, the engineer, was negligent in backing up the engine and cars at an unusual and great rate of speed, yet, if you find that the plaintiff himself was guilty of contributory negligence in going between the cars while they were in motion, plaintiff cannot recover under the fifth count of the complaint." Charge 15: "I charge you, gentlemen of the jury, that unless you believe from the evidence that the engineer was guilty of willful or wanton negligence in backing up his engine and cars at a great and dangerous rate of speed, and was conscious of the fact at the time that his act was likely to and probably would result in injury to plaintiff, then the plaintiff cannot recover under the sixth count of the complaint." Charge 16: "The court charges the jury that there is no evidence in this case that any custom among switchmen or brakemen on the defendant's road of going in between moving cars to couple them was known to and acquiesced in by defendant." Charge 18: "The court charges the jury that the rule of the defendant prohibiting employees from going in between moving cars to couple or uncouple them while in motion was a reasonable rule." Charge 19: "The court charges the jury that there is no evidence in this case that the rule prohibiting employees of defendant from going in between moving cars to couple them had been rescinded or abandoned by the defendant in regard to the plaintiff in this case." Charge 20: "If the jury believe from the evidence that the cars could have been coupled without plaintiff going in between them, and believe that the defendant's rule, of which plaintiff had knowledge, prohibited employees from going in between cars while in motion to couple or uncouple them, then, if the plaintiff

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went in between said cars while in motion for the purpose of coupling them, he was guilty of contributory negligence and cannot recover in this case, unless the jury believe, further, that the defendant's employees, after being aware of plaintiff's perilous position were guilty of negligence that caused his injury."

Charge 21: "If the jury believe from the evidence that the plaintiff signaled the engineer to back his train while he was standing on the outside of the track, and the engineer in obedience to said signal backed up his engine and cars in an ordinarily prudent manner, and before the cars reached those to which they were to be coupled the plaintiff went in between the cars, and that as soon as the engineer discovered this fact he used all means at hand to stop his train, and could not stop his train before striking the other cars, then the plaintiff cannot recover in this cause." Charge 22: "If the jury believe from the evidence that

the engineer was taking his signals from the plaintiff in this cause, and did not see any signals given by Porterfield, then the plaintiff in this cause cannot recover on account of any alleged negligence of Porterfield in giving the signals." Charge 23: "If the jury believe from the evidence that the plaintiff was ordered by Porterfield, the yard conductor, to make the coupling he was attempting to make when injured, the fact that he was ordered to make the coupling did not authorize or justify him in going between the said cars to make said coupling in violation of the rules of the defendant and of which plaintiff had knowledge."

Charge 25: "In regard to the custom as to going in between cars to make couplings, unless you believe from the evidence that such custom was known to the defendant and acquiesced in by it, or had prevailed for so long a time that defendant was bound to know it and would be presumed to have acquiesced in it, then you should not consider such custom in arriving at your verdict." Charge 26: "If the jury believe from the evidence

that the plaintiff could have made the coupling by using the drawhead on the car attached to the engine, instead of the one on the stationary car, and could have by doing so made the coupling without going in between the moving cars, it was his duty to do so; and if he failed to do so he was guilty of contributory negligence in going between the moving cars." Charge 27:

"There is no evidence in this cause that the contract of employment between the plaintiff and the defendant had been mutually abandoned." Charge 28: "The engineer and conductor had a

right to presume that the plaintiff would, if he had knowledge of them, obey the rules of the defendant prohibiting employees from going in between cars for the purpose of coupling them." Charge

29: "If the jury believe from the evidence that plaintiff knew that the rule of the defendant prohibited employees from going in between moving cars for the purpose of coupling them, and it was not necessary for the plaintiff to go in between them while they were moving in order to couple them, he was guilty of contributory negligence."

*Huggins v. Southern Ry. Co**Rone Ward and Estes & Smith, for appellant.**James Weatherly, for appellee.*

ANDERSON, J. Without determining the sufficiency of the sixth plea, it was not subject to the grounds of demurrer assigned. And what we say applies to the eighth plea also. The ninth plea was good. It charges the plaintiff with going between the cars to do the coupling when it was unnecessary, and that his going between the cars was the proximate cause of his injury. If he could have made the switch without going between the cars, he should have done so, and should not have adopted a more hazardous or dangerous way to do so.

The demurrer was properly sustained to the third replication to the eighth and ninth pleas. It does not aver that the order was given by one who had the authority to order a violation of the rules and whose orders it was the plaintiff's duty to obey.

After the evidence was in, but before the case was given to the jury, the plaintiff asked leave to amend the complaint by adding counts 7 and 8. The only limitation upon the right of a plaintiff in a civil action at law to amend his complaint at any time before the cause is finally submitted to the jury, and they have retired, is that the form of the action must not be changed. There must not be an entire change of parties, nor can there be the substitution or the introduction of an entirely new cause of action. *Ga. Ry. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006; 4 Mayfield's Dig. p. 448, § 165, and cases there cited. It would be error without injury to deny the amendment, if it was but a repetition of what was in the original complaint. So, too, has it been held not to be error to refuse an amendment offered after the evidence of the plaintiff had closed and which was supported by no testimony. *Beavers v. Hardie*, 59 Ala. 570.

The negligence charged in the amendment was a neglect of duty on the part of Porterfield by allowing or permitting the cars to be run back. The negligence as charged in the original complaint on the part of Porterfield was, in count 2, that he negligently ordered the plaintiff to couple the cars; third, that he directed or signaled the engineer to back up; and the fourth is like unto the third, with an averment of wantonness. The amendment was, therefore, no repetition or substitution of the original complaint; nor can we say that the amendment was unsupported by the evidence. True, the defendant's evidence tended to show that the engineer was acting upon the signals given by the plaintiff; but the plaintiff's evidence was to the effect that the engine and the cars came back upon the signal or direction of Porterfield, who had ordered plaintiff to make the coupling, who knew where he was, when the cars were being backed, and that the cars came back with considerable force, knocking the other cars some distance. Now if the engineer was acting upon the signals of Porterfield, and it was true that he ordered the engine and cars back, it was clearly an inference for the jury to determine whether or not there was negligence on the part of Porterfield, knowing the

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peril of the plaintiff, in failing to signal or direct the engineer to stop or slacken the speed of the engine and cars before striking the detached cars. The trial court erred in not permitting the amendment.

There was no error in the ruling of the trial court upon the taking of the evidence of witness, Ed. Davis. He was a railroad man, and could give an opinion as to coupling cars. Besides, he had testified on the direct examination what cars could be coupled without going between them, and the defendant had the right to ascertain if it was necessary to go between these cars to make the coupling in question.

We cannot pass intelligently upon the assignment of error growing out of the examination of the plaintiff as a witness, as there is considerable confusion in the record as to the execution of papers by him. Wm. Hagin testified that plaintiff delivered him an application, but that he did not see him sign it. This was no proof of the execution; but the bill of exception does not disclose what paper was introduced—does not show that it was the paper exhibited to the plaintiff when a witness. Neither does the record show that the paper purporting to be signed by the plaintiff was ever introduced, or, if so introduced, that it was the one the execution of which was proved by Hagin. It seems that two papers were introduced when Hagin was on the stand, but whether either of them was the one set out with plaintiff's testimony we cannot say. If such was the case, we cannot identify it as the first or last one testified to by Hagin.

There was error in permitting the witness Sexton to testify as to the condition of the cars and to describe the couplings, as the numbers corresponded with the two between which plaintiff was hurt, as identified by the witness Porterfield. There was no error in permitting the witness Porterfield to testify to what he told plaintiff about going in between the cars the day he started to work, and of his calling attention to the rules. Nor was there any error in permitting the witness to testify that the cars would couple without the use of the lever, or that it could have been made without the plaintiff putting his hand or arm between the couplers.

There was no error in permitting the introduction of the statement signed by Neely and Beaverly. It is true it was not signed by the plaintiff; but Neely testified that, while he declined to sign it, it was read over to him, and he admitted that it was correct.

Charge 7, requested by the plaintiff, was properly refused. If not otherwise bad, it could have no application to the case under the complaint upon which the case was tried, as there was no evidence of wantonness on the part of Porterfield growing out of any act or omission set out in the complaint.

Charge 10, requested by the plaintiff, was properly refused. If not otherwise bad, it seeks a recovery, whether the defect was the proximate cause of the injury or not. It makes no differ-

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ence how defective the car was, unless said defect was the proximate cause of the injury.

We cannot intelligently consider charge 11, refused to the plaintiff, on account of the confusion of the evidence relating to the execution of the contract.

Charge 12 was properly refused, and is fully covered by the discussion with reference to the amendment to the complaint. The complaint upon which the case was tried had no averment of a failure of Poterfield to stop the cars. What we say as to charge 11 relates to charges 13 and 14.

Charge 16, requested by plaintiff, was properly refused. If not otherwise bad, it gives the plaintiff the right to recover, although he may have been guilty of contributory negligence.

The fallacy of charge 17 is shown in what we say as to charge 12.

Charge 18 was properly refused. If not otherwise bad, it was no implied order to go between the cars when told to couple them, when he could so do without going between them.

There was no error in refusing charges 20 and 21, requested by the plaintiff.

Charge 12, given at the request of the defendant, simply required proof of the allegations of count 4 before there could be a recovery thereunder.

Charge 14 was properly given for defendant. It simply instructed the jury that plaintiff could not recover under the fifth count if the plaintiff was negligent in going between the cars, for his going in between the cars was the proximate cause of his injury, and if he did so negligently that would be a good defense to the fifth count, which averred simple negligence.

There was no error in giving charge 15, requested by the defendant. 4 Mayfield's Dig. 300.

Charges 16 and 19 assert the truth, and, while we have heretofore declined to reverse the trial court for refusing such charges, it is not reversible error to give them.

Charge 18, given for the defendant, asserts the law. *M. & C. R. R. Co. v. Graham*, 94 Ala. 545, 10 South. 283.

Charge 20, requested by the defendant, was the law.

There was no error in giving charges 21 and 22 at the request of the defendant.

There was no error in giving charge 23, requested by the defendant. Poterfield may have given him the order to couple, yet it would not justify him in going between the cars, unless he had to do so to comply with the order.

There was no error in giving charge 25, requested by the defendant. If there was a custom among the operatives violative of the defendant's rules, the defendant could not be bound by the custom, unless it knew and acquiesced therein.

There was no error in giving charge 26, requested by the defendant. If plaintiff could have made the coupling without going

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in between the cars, he was guilty of contributory negligence in going in between them.

There was no error in giving charge 27, requested by the defendant. Nor was there error in giving charge 29.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

DENVER & R. G. R. Co. v. WARRING.

(Supreme Court of Colorado, May 7, 1906. Rehearing Denied July 2, 1906.)

[86 Pac. Rep. 305.]

Courts—Foreign Statutes—Construction—Decision of Supreme Court.—In an action based on the statutes of the territory of New Mexico, the courts of Colorado are bound by the construction placed on the statute by the Supreme Court of New Mexico.

Death—Action by Administratrix—Statutes.—Comp. Laws N. M., § 3216, provides that every corporation operating a railway within the territory shall be liable for damages sustained by an employee in consequence of any neglect, default, or wrongful act of any agent or employee of such corporation while in the exercise of their duties, when such neglect, etc., could have been avoided through the exercise of reasonable care in the selection of competent employees or agents, or by not overworking them an unreasonable number of hours, and section 3218 declares that whenever the death of an employee shall be caused under circumstances from which a cause of action would have accrued under section 3216, the action may be brought by deceased's personal representatives. Held, that such sections conferred a right of action by personal representatives for death of a railway employee caused by defendant's failure to employ and select a sufficient number of competent men to properly guard their track against rock falling thereon from the hillside adjoining such right of way.

Same—Distribution of Proceeds.—Where an action for death is brought under a foreign statute, the fund recovered is to be distributed to the persons entitled thereto under the statute of the place where the cause of action arose rather than to those who would be entitled thereto under the statutes of the forum.

Same—Right to Sue.*—Where an intestate was killed by the wrongful act of a railway company in a state whose statutes authorized an

*For the authorities in this series on the subject of transitory actions and the extraterritorial effect of statutes creating a right of action, see *Baltimore & O. R. Co. v. Chambers* (Ohio), 18 R. R. R. 766, 41 Am. & Eng. R. Cas., N. S., 766; foot-notes appended to *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 18 R. R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542; foot-notes appended to *Kansas City S. Ry. Co. v. McGinty* (Ark.), 17 R. R. R. 71, 40 Am. & Eng. R. Cas., N. S., 71.

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action therefor on behalf of his personal representatives, the action, being transitory, could be properly maintained by intestate's administratrix in Colorado; the action not being contrary to the policy of the Colorado laws.

Master and Servant—Death of Servant—Negligence—Question for Jury.—Where intestate, a railroad employee, was killed by his train striking a rock that had fallen onto the track from a point on the slope of the adjoining mountain outside of the right of way, but which was plainly visible therefrom, and there had been no inspection of the track after 5:30 p. m. on the day of the accident until it occurred at 11:30 p. m., whether defendant was chargeable with negligence was for the jury.

Trial—Instructions—Credibility of Witnesses.—An instruction that, if the jury believed that witnesses had willfully testified falsely to any material fact in the case, they might disregard the whole of his or her testimony, was proper.

Same—Duty of Jury.—An instruction authorizes the jury, in elucidating and explaining the testimony and in arriving at a verdict, to consider any knowledge they might have common to mankind generally touching the matters, testified about, was not objectionable as authorizing the jury to rest their verdict on facts outside the evidence.

Master and Servant—Death of Servant—Negligence—Question for Jury.—Where intestate, a railroad employee, was killed in a wreck caused by a rock falling onto the track, and it appeared that there had been no inspection of the track for about six hours prior to the accident, it was not error for the court to submit to the jury whether the railroad company was chargeable with negligence in not patrolling the track or making such other inspection thereof for the purpose of protecting the passage of the particular train on which deceased was riding.

Same—Instructions—Duties of Master.—In an action for death of a railway employee in a wreck caused by his train striking a rock which had fallen onto the track, the court charged that if defendant, in the exercise of ordinary care, could have reasonably apprehended that boulders were liable to roll down the mountain side onto the track, and that any track walkers in that immediate vicinity, in passing over the point in question in front of the train, "might have discovered" that the boulder had rolled down and warned the train in time to have avoided the injury, etc., plaintiff was entitled to recover. Held, that the words "might have discovered" were used merely as the equivalent of "would have discovered," and did not, therefore, render the instruction erroneous as imposing too high a degree of care.

Trial—Instructions—Conformity to Evidence—Objections.—Where, in an action for the death of a railroad employee, no rule of defendant company was offered in evidence and no instruction was tendered by defendant with reference to its rules, defendant could not object to an instruction on intestate's contributory negligence in riding on the engine, on the alleged ground that the instruction abrogated or ignored defendant's rules.

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Master and Servant—Death of Servant—Negligence—Instructions.

—In an action for the death of a railroad employee in a wreck caused by his train striking a rock which had fallen onto the track, an instruction that, if the railway company in the exercise of reasonable care could not have discovered that the rock was liable to fall on the track, plaintiff was not entitled to recover, unless the company was negligent in not properly inspecting the track prior to the passage of the train and such negligence was the proximate cause of the injury, was proper.

Same.—An instruction that defendant railroad company was bound to use all reasonable precaution to secure the safety of its employees by keeping a sufficient force of men and of sufficient capacity to keep its roadway reasonably safe for the passage of its trains and the employees in charge thereof, and that it could not for want of watchfulness expose its employees to any unreasonable risk and escape liability for injuries, etc., was not erroneous as in effect charging that the principal aim of the operation of a railroad was the safety of its employees.

Same—Assumed Risk.†—A railroad employee assumes the "ordinary" risks of his employment, and not those arising from the negligence or want of reasonable care on the part of the railroad company in failing to inspect its track or maintain it in proper condition.

Appeal from District Court, La Plata County; James L. Russell, Judge.

Action by Belle Warring, as administratrix, etc., against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wolcott, Vaile & Waterman and *Reese McCloskey*, for appellant.

B. W. Ritter and *J. C. Petheridge*, for appellee.

STEELE, J. Warring was employed by the Denver & Rio Grande Railroad Company as a brakeman on one of the company's freight trains during the month of March, 1901. He lost his life in a wreck occurring on that portion of the road situated in New Mexico. At the time of his death he was a resident of

†For the authorities in this series on the question whether trainmen assume the risks from the unsafe condition of tracks, see foot-notes appended to *Northern Ala. Ry. Co. v. Shea* (Ala.), 14 R. R. R. 514, 37 Am. & Eng. R. Cas., N. S., 514.

For the authorities in this series on the subject of the general principles involved in the doctrine of the assumption of risks by employees, see foot-notes appended to *Central of Georgia Ry. Co. v. Price* (Ga.), 19 R. R. R. 246, 42 Am. & Eng. R. Cas., N. S., 246; foot-notes appended to *Anderson v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 238, 42 Am. & Eng. R. Cas., N. S., 238; *Merrill v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 221, 42 Am. & Eng. R. Cas., N. S., 221; *Leach v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 212, 42 Am. & Eng. R. Cas., N. S., 212; foot-notes appended to *Wagner v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187; *Houston, etc., R. Co. v. Turner* (Tex.), 18 R. R. R. 630, 41 Am. & Eng. R. Cas., N. S., 630.

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Durango, in this state. His widow, the appellee here, was appointed administratrix of his estate by the county court of La Plata county on October 24, 1901, and on November 4, 1901, brought this action, claiming that it was by reason of the negligence of the company that her intestate lost his life. The complaint charges the company with negligence, and alleges that it negligently and carelessly failed to provide for the proper inspection of its track, and carelessly and negligently failed to cause any examination to be made of the hillside, or of the boulders, rocks, cliffs, or ledges thereon, and carelessly and negligently failed to take any precaution to prevent the falling or precipitating of rock, boulders, or earth upon said track, and carelessly and negligently suffered and permitted a large and heavy rock, which had become loosened and was about to fall, to remain in a dangerous and unsafe position on said hillside about 350 feet distant from the center of defendant's track, which rock and the dangerous and insecure position of the same was in plain view of said track, and could have been known to the defendant in the exercise of reasonable care. From a judgment in the sum of \$5,000, the company has appealed.

The points mainly relied upon by the appellant to reverse the judgment are: (1) The laws of New Mexico do not confer a right of action for the death of Warring under the circumstances disclosed by the complaint. (2) The plaintiff has no legal capacity to sue. (3) There was no proof of actual negligence on the part of appellant. (4) Error in the giving and refusing of instructions.

The plaintiff introduced sections 3214, 3215, 3216, and 3218 of the Compiled Laws of New Mexico as the basis of her right of action. Counsel for appellant contend that the Supreme Court of New Mexico has held that section 3214 does not apply to common carriers, and that section 3213 does apply, and that actions brought under 3213 must be brought in the name of the beneficiary mentioned in the statute, and not by the personal representative. In the case of *Romero v. A., T. & S. F. R. Co.*, 11 N. M. 679, 72 Pac. 37, the court did hold that section 3214 does not apply to common carriers, but that section 3213 does apply to common carriers, and that for causes of action arising under such section the legal representatives were not authorized to bring or maintain actions. We think that counsel for appellee is wrong in his contention that section 3214 applies as well to railway companies as to any other person or corporation, and we feel that we are bound by the construction placed upon the statutes of New Mexico by the Supreme Court of that territory. But we are of opinion that sections 3216 and 3218 of the Compiled Laws of New Mexico authorize this action by the representative of the deceased. Section 3216 is as follows: "Sec. 3216. Every corporation operating a railway in this territory shall be liable in a sum sufficient to compensate such employee for all damages sustained by any employee of such corporation, the person in-

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jured or damaged being without fault on his or her part, occurring or sustained in consequence of any mismanagement, carelessness, neglect, default or wrongful act of any agent or employee of such corporation while in the exercise of their several duties, when such mismanagement, carelessness, neglect, default or wrongful act of such employee or agent could have been avoided by such corporation through the exercise of reasonable care or diligence in the selection of competent employees or agents, or by not overworking said employees, or requiring or allowing them to work an unusual or unreasonable number of hours; and any contract restricting such liability shall be deemed to be contrary to the public policy of this territory and therefore void." Section 3218 provides, in substance, that a cause of action arising under this section shall be brought by the personal representative of the deceased.

Counsel for appellant, we think, place too narrow a construction upon section 3216. The right is not general, but is limited to injuries occurring through mismanagement, carelessness, neglect, default or wrongful act of agents or employees, only when such mismanagement, carelessness, neglect, default or wrongful act could have been avoided by such corporation through the exercise of reasonable care or diligence in the selection of competent employees or agents, or by not overworking said employees or allowing them to work an unusual or unreasonable number of hours. But we cannot place such construction upon the statute. We do not think the company can escape liability by showing that its employees are competent, or have not been overworked, or have not worked an unusual or unreasonable number of hours. The statute, it seems to us, requires not only that the company should select competent employees and provide reasonable hours for them to work, but should employ and select a sufficient number of competent employees to properly guard their track and inspect their machinery and appliances. We are therefore of opinion that the company is liable for damages to its employees under section 3216, if it should appear that a reasonable inspection of the company's tracks and the hillsides beyond its track would have prevented the injury, and that under that section it is necessary for the company to not only select competent employees but to also select a sufficient number thereof to properly perform the duties assigned them.

The laws of New Mexico require actions of this character to be brought in the name of the personal representative of the deceased. In this state the personal representative has no right of action. In New Mexico the proceeds of any judgment obtained must be distributed to the heirs of the deceased, as designated by statute. In Colorado the action accrues to the heirs, according to the preferences fixed by statute. Because of this difference between the statute of the place where the injury resulting in death occurred and the statute of the place where the action is brought, counsel insist that the action cannot be

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maintained by an administrator appointed in this state. It is now established by the overwhelming weight of authority that a statute creating a cause of action for the damages sustained by the relatives or next of kin of the deceased is not penal, and that the cause of action is transitory, and may therefore be enforced in any state or country whose public policy is not opposed to the recognition and enforcement thereof. Wharton on Conflict of Laws, 1114. It is also "established, both upon reason and authority, that the fund recovered is to be distributed to the persons entitled to it under the statute of the place where the cause of action arose, rather than to the persons who would be entitled according to the statute of the forum." Wharton on Conflict of Laws, 1129.

Counsel for appellant say "that a domestic administrator can never maintain a suit in his forum unless the following conditions exist: (a) The *lex loci* gives the right of action to the personal representative. (b) The *lex fori* permits a domestic administrator to collect, account for, and distribute the fund as a part of the administration of the estate of his decedent." It will be conceded that the action must be brought by the person designated in the statute of the place where the injury occurred, and not by the person designated by the law of the forum. There is a decided conflict of authority upon the question, and we shall not undertake to review the cases. Wharton has this to say upon the subject: "While the weight of authority makes the existence of a similar statute of the forum a condition of jurisdiction of a cause of action arising under the statute of another state or country, the statute of the forum is invoked only for the purpose of removing any objection, based upon the public policy of the forum, to entertaining the action, and never, at least unless it expressly or by necessary implication extends to extraterritorial torts, for the purpose of creating a cause of action based upon a tort occurring outside of the forum. * * * The action must be brought by and in the name of the party designated by the statute of the state or country in which the cause of action arose, even though a similar statute of the forum provides that the action shall be brought by some other party. Thus, if the statute of the state or country where the cause of action arose provides that the action shall be brought directly by the beneficiaries, or some one of them, that provision prevails, notwithstanding that the statute of the forum provides that the action shall be brought by the personal representative. Conversely, if the statute of the state or country where the cause of action arose provides that the action shall be brought by the personal representative, it must be brought by such representative, even though the statute of the forum provides that it shall be brought directly by the beneficiaries. * * * When the *lex loci delicti* does not merely keep alive an action arising in favor of the deceased, but, like Lord Campbell's act creates an entirely new right of action, and provides that it shall be brought

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by the personal representative for the benefit of the next of kin, or other specified beneficiaries, there is a decided conflict among the authorities as to whether a personal representative appointed at the forum may maintain the action. Some of the cases have denied such right, upon the ground that the right which the statute gives to the personal representative of the deceased as a trustee for the beneficiaries is not of such a nature that it can be imparted to an executor or administrator appointed at the forum, *virtute officii*. The United States Supreme Court, however, has held that an administrator appointed at the forum may maintain the action under such circumstances, and that view seems to be supported by the weight of authority." Wharton on Conflicts of Laws, 1126-1135.

The case cited by Wharton is *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439. Mr. Justice Miller, delivering the opinion of the court, said: "A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish that, in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens redressed in no other state of the Union? The contrary has been held in many cases. See *Ex parte Van Riper*, 20 Wend. (N. Y.) 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Railroad v. Sprayberry*, 8 Baxt. (Tenn.) 341, 35 Am. Rep. 705; *Great Western Railway Co. v. Miller*, 19 Mich. 305. But it is said that, conceding that the statute of the state of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that state and amenable to its jurisdiction. The statute does not say this in terms. 'Every such action shall be brought by and in the names of the personal representatives of such deceased person.' It may be admitted that for the purpose of this case the words 'personal representatives' mean the administrator. The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is that such suit shall not be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there by holding that the personal representative must be one residing in the state or appointed by its authority. The statute says the amount recovered shall be for the benefit of the widow and next of kin. Why not add here, also, by construction, 'if they reside in the state of New Jersey?' It is obvious that

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nothing in the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the state? The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages and to whom they shall be paid. In this there is no ambiguity. But, fearing that there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one state, suing in that character in the courts of another state, without any authority from the latter. It is the general rule that this cannot be done. The suit here was brought by the administratrix in a court of the state which had appointed her, and, of course, no such objection could be made. If, then, the defendant was liable to be sued in the courts of the state of New York on this cause of action, and the suit could only be brought by such personal representative of the deceased, and if the plaintiff is the personal representative, whom the courts of that state are bound to recognize, on what principle can her right to maintain the action be denied? So far as any reason has been given for such a proposition, it seems to be this: That the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey statute. But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey; and as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute. Again, it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as specific property devised to individuals, or the amount which by the legislation of most of the states is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator, clothed with the apparent right to receive or recover

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property or money, may be compelled to deliver or pay it over to some one who establishes a better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs. It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that state would be held to have recovered to the same uses, and subject to the same remedies in his fiduciary character which both statutes prescribe."

And it seems to be the rule in most states that, unless there is some law of the forum which will prevent the action from being maintained by the person designated by the law of the place where the injury occurred, it may be so maintained. Counsel say that the policy of our state concerning the distribution of money or property coming to the administrator is contrary to the policy of New Mexico, and that, as the statutes of the two jurisdictions are so dissimilar, we should not entertain this action. But the statutes are not so dissimilar, in our judgment, as to warrant the courts of this state declining jurisdiction. The policy of our state is practically the same as that of New Mexico, in that damages may be recovered by the relatives or next of kin of a deceased person where his death has been occasioned by a negligent act of a railroad company, and we are of opinion that the better rule is that announced by Mr. Justice Miller in the case cited, and that actions of this kind may be maintained in this state by a personal representative, and that it is within the power of the courts of this state to direct the money recovered, if any, on the judgment, to be distributed in accordance with the laws of New Mexico. Warring and his family were residents of the state of Colorado. The railroad runs for a very short distance through the territory of New Mexico and then back into this state. The statute of New Mexico and the statute of Colorado both provide that damages may be recovered for the death of a person occasioned by the negligence of a railroad company, and we believe that comity and right requires us to permit this administratrix to maintain the action in this state, and that it would be a reproach to the laws of Colorado to decline jurisdiction upon the ground that our courts could not compel distribution as provided by the laws of New Mexico.

The road of appellant runs through the canon of the Navajo river. While in this canon, on the night of March 9, 1901, the locomotive engine on which Warring was riding overturned. He was caught under the engine and was killed. Some time

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before this a large rock had rolled down from the mountain side and struck the rails of appellant's track and displaced them. It was this displacement of the rails that caused the engine to overturn. Warring was a head brakeman and was riding in the cab of the engine, facing the rear of the train. The company does not employ track walkers whose duty it is to regularly inspect the track at night. It does employ track inspectors, and one of them passed over the place in the track where the rock came down, at 5:30 o'clock p. m. The engine was overturned about 11:30 p. m. of the same day. The rock that threw the rails out of the alignment came from a point on the mountain side 350 feet distant from the center of the track. The company has a right of way 100 feet on each side the center of its track. The testimony shows that the sides of the canon through which the road runs are covered with brush and pinon trees, loose rocks, gravel, and dirt; that the slope of the hill above the track where the rock came down is about 35 degrees. The rock weighed about 16 tons. A few days before the accident another rock had rolled down the mountain side at or near this place. The road master of the company testified: "We have had dirt slides at numerous times, but not rock that I know of, only on these two occasions." The witness Ridgway, a civil engineer employed by the company, when asked, "Is it not a fact * * * that you have more difficulty in the spring of the year by reason of these boulders rolling down the mountain sides, than at any other season of the year?" said, "I think this is what we usually expect in the spring." The section foreman, for the company, testified: "The duty of a foreman of that section is to keep the track in shape and clear. We are supposed to keep the right of way clear from rocks. I make a thorough inspection of the side cuts and side hills whenever anything looks suspicious. I do that frequently. Q. You state if any rock ever came down while you were on that section? A. There was one came down previous to that. That was about 50 feet east of where this rock came down. After that rock came down I inspected the hillside to the top of the hill. It was about three weeks, I think, before this accident. I know where the rock that caused this accident came from. I think I went over the place when I made my examination in reference to the other rock. There was nothing there that attracted my attention to the rock which caused this accident. I was looking for loose rock and anything that might be loose. Rocks are most liable to fall in the spring of the year, when the winter snow is going off. * * * Q. You have two rocks that came down in the night during the time that you know of? A. Yes, sir. Q. And one that is about 3 weeks before and 50 feet east of where the rock stood that derailed the train? A. Yes, sir. * * * I had two men on that section at the time. We worked from 7 o'clock to 12, noon, and from 1 to 6. We had seven miles to cover. On that day we were working on the west end. We came from the West end about 5:20; came into the

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section house at 6; passed over the point where the derailment occurred about 5:20. That was the last time we passed over it that evening." Mr. Ridgway testified: "The reason I assigned for the falling of the rock was this: Almost the entire portion of the cavity disclosed that there had been a seam in the sandstone ledge, being so sparsely covered by earth and small pieces of sand that had been there for a long time. The freshly fractured portion seemed to me to prevent the falling of the rock without some outside influence. I attributed the fall to the fact that water from the rain or snow had collected in this seam and had been there imprisoned, freezing and raising the left-hand portion so that it broke off, and, the right-hand portion of the solid ledge then not being able to support it, it rolled down the hill." The witness Tiffany testified: "From this examination we were able to determine to our satisfaction the point from which that rock started. We found fresh marks down the hill, comparatively a straight line, indicating that the rocks had been ground or broken comparatively recently. * * * We followed this path until we reached a point where no more of these signs could be observed. At this point there were indications showing that something had stood at that place. The ground where this something had come from was fresh. Around the upper edges of it were small plants hanging by their roots, showing that something had been removed from that place. The foundation, or bed, upon which this rock was resting, was earth and loose rock. * * * I concluded from our examination that this rock had not been attached to any other rock prior to its fall. That hillside is solid rock in places, boulders, small rocks, earth, trees, brush, etc. There are large rocks also lying upon the hillside. There was nothing to prevent the point from which this rock apparently came from being seen by any person passing along the railroad track and inspecting the sides of the hill, if you got in the right position. It could be seen from the railroad track immediately below it in the path of the rock. Standing at the point where the rock came from, I could see the railroad track immediately below and at other places." The roadmaster of the defendant testified: "The men on that section were supposed to work from 7 a. m. to 6 p. m., and one hour for dinner. There were no track walkers employed regularly on that section at that time." Several photographs of the place where the accident occurred and of the place where the rock that came down was lodged were used at the trial.

We are of opinion that it was the province of the jury to determine whether the company had fulfilled its obligation to its employees to exercise ordinary care in the maintenance of its track and roadbed. In a similar case, before the United States Circuit Court of Appeals, Mr. Justice Thayer, rendering the opinion of the court, said: "It is an elementary rule that a railroad company is under an obligation, both to its employees and to the traveling public, to exercise ordinary care both in the con-

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struction and maintenance of its track and roadbed, to the end that they may be reasonably safe for the passage of trains; and the proper discharge of that obligation makes it the duty of a railroad company to be observant of all objects in close proximity to its track, which in the ordinary course of events may impair its safety. If rocks overhang its track, or loose rock is imbedded in the slope of cuts through which its track runs, in such a position that they may be displaced by the ordinary action of the elements and precipitated upon its track, it should either remove them, or take other adequate precautions to guard against the danger, and render its track reasonably safe. In the case in hand we are unable to say that all reasonable men, listening to the evidence which was adduced at the trial, would have concluded that the receiver had performed his full duty with respect to caring for the safety of the track intrusted to his charge, and was not chargeable with any negligence. The rock which occasioned the accident was known to be a loose rock. It was also known to be imbedded in slide or wash on the face of a steep slope, and that it was of enormous weight. It did not rest upon a secure foundation. It was certain to fall sooner or later, and its descent was sure to wreck the track, and might occasion great loss, both of life and property. Besides, the continuous action of frost and floods, and the vibration caused by moving trains, would have a tendency to render it more insecure each year unless it rested upon a rock foundation. In view of these considerations, and in view of the fact that the evidence showed that the track through the canon was not patrolled at night, although trains ran at night as well as by day, it is very probable, we think, that many persons would have reached the conclusion that in the exercise of ordinary care the defendant should have ascertained with greater certainty upon what sort of a foundation the rock rested, and should not have trusted to a casual examination, made hastily and at intervals from the platform or window of a moving train." *Clune v. Ristine*, 94 Fed. 745, 36 C. C. A. 450.

The rock in the case at bar came from a point on the slope of the mountain outside of the right of way of the company. It was plainly visible from the track, however, and the character of it was, or should have been, known to the company. We do not think the obligation of the company ends with an inspection of its right of way. Objects beyond its right of way may be quite as menacing and dangerous as those within, and the company is not relieved of its obligation by showing that the rock came from a place on the mountain beyond its right of way. A week or so before another rock came down in the night and injured materially the company's track, and from a place not far distant from the rock in question. Not long before, but in the same canon, a large quantity of dirt and small rocks had come down, completely covering the track. Witnesses and employees of the company testified that in the spring these disturbances were more likely to occur, yet the company, it was shown, did

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not have the track patrolled at night. There was no inspection of the track at this place after about 5 o'clock in the afternoon before the accident. We are of opinion that the question of negligence should have been submitted to the jury.

The instructions numbered 4, 5, 6, 7, 8, 9, 10, and 12 are especially objected to. Instruction No. 4, it is said, is directly contrary to the law as announced in *Last Chance M. & M. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382. We do not so read the instruction. The jury were told that, "if you believe that any witness has willfully testified falsely to any material fact in the case, you may disregard the whole of his or her testimony." This is in perfect harmony with the decision in the case mentioned, and not contrary to the law as therein announced.

It is claimed that by instruction No. 5 the jury is authorized to go outside the evidence, and that "it is perfectly apparent that the jury availed themselves of this permission thus given and rested their verdict upon theory and conjecture, rather than upon facts established by the evidence." The jury was instructed: "You have a right, in elucidating or explaining the testimony and arriving at your verdict, to take into consideration any knowledge which you may have which is common to mankind generally, touching the matters testified about." This only permits the jury to use the knowledge common to mankind, and does not authorize it to go beyond the evidence. Moreover, in another instruction, the jury was instructed that it was their sworn duty to be guided by the evidence. We do not agree with counsel that the jury rested its verdict upon theory and conjecture rather than upon the facts established, for it is our opinion that the verdict is supported by the evidence.

Instruction No. 7 charges the jury as follows: "It seems by the testimony that the defendant met with his death on the 9th day of March, 1901. If you find from the evidence that this was a season of the year when the defendant company knew, or by the exercise of ordinary care, prudence, and foresight it should have known, that freezing and thawing of the earth and snow on the south slope of the mountain was going on, and that by reason thereof boulders and rocks were more liable to become loosened and slide or roll down the mountain side onto the track at or in the vicinity of the place where Warring was killed, then it was the duty of the defendant company to be more watchful and careful to see that its roadway and track were safe for the passage of trains and its employees in charge thereof. And if you find from the evidence that the character of the country was such at and in the vicinity of the point in question that it was necessary to have track walkers at night in order to reasonably protect the passage of its trains and employees in charge thereof from danger, then it was the duty of the defendant company to provide such night inspectors or track walkers, and if it failed in this particular, and did not use reasonable and ordinary care and prudence in protecting the passage of its trains and the

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employees in charge thereof against such dangers as caused Warring's death, and did not so protect the train upon which Warring was riding, and Warring was killed by reason thereof, then your verdict should be for the plaintiff, unless you further find from all the evidence that he was guilty of contributory negligence which materially contributed to his death, or that he assumed the risk." It is insisted that this instruction, aside from erroneously assuming certain conditions to have been shown by the evidence, submits to the jury the question whether the company should have employed track walkers immediately ahead of the particular train on which the deceased rode. It was the duty of the company to use such means as were necessary to maintain its track and roadbed in such condition that they were reasonably safe for the passage of trains. That the track of the company was not in condition for the passage of the train on which Warring rode cannot, of course, be disputed. It was shown by the testimony that the company had made no inspection of the track for about six hours prior to the accident. If the duty of patrolling the track or making such other inspection for the purpose of protecting the passage of its trains devolves upon the company, it devolves upon it to protect each train, and the statement contained in the instruction, "and did not so protect the train upon which Warring was riding," we do not regard as erroneous. The instruction is supported by the evidence, and no error was committed in so charging the jury.

In instruction No. 8 this clause is found: "And if you find from all the evidence * * * that the defendant company, in the exercise of ordinary care, prudence, and foresight, could have reasonably apprehended that boulders were liable to roll down from the mountain side onto the tract, and that any track walkers in that immediate vicinity, in passing over the point in question in front of this train, might have discovered that the boulder or rock had rolled down * * * and warned the train in time to have avoided the injuries." Counsel say that by the use of the word "might" a higher degree of care was required of the company than the law imposes. We do not think the jury was misled into granting a verdict for the plaintiff upon the theory that the company was liable if by any possible contingency it could have discovered the rock in question in time to have warned the train upon which Warring was riding. The use of the words "might have discovered," etc., have no greater significance, we think, than the words "would have discovered," taken in connection with the testimony and the other instructions. Moreover the defendant used the same expression in an instruction tendered by it. The testimony showed that the company, although it ran trains at night, did not provide for the inspection of its track at night; that no employee of the company had been over the track after about 5 o'clock in the afternoon previous to the derailment of the engine. Whether the failure to inspect its track was or was not negligence was a question for the jury to determine, and

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the jury was told that if it found from the evidence that in the exercise of ordinary care on the part of the defendant company to protect the passage of its trains it was necessary to have track walkers in front of this train in order to protect it and the employees in charge thereof, and that there were no such night track walkers or night inspection, and that by reason thereof Warring met his death, "then your verdict should be for the plaintiff, unless," etc.

In instruction No. 9 the jury was told that it should decide whether the defendant had or had not assumed the risk of a boulder rolling down the mountain side and injuring the track. The court observed that the law excuses a master when the injury results in the servant from the ordinary hazards which are incident to the nature of the employment, and not from a cause which the master, by the exercise of proper care and prudence, could have foreseen and guarded against. In the recent case of *D. & R. G. R. Co. v. Burchard* (not yet officially reported), 86 Pac. —, this court quoted with approval from *Yeaton v. Boston & Lowell Railroad*, 135 Mass. 418, the following: "The general rule of law, that a servant takes upon himself the risk of the dangers which ordinarily attended or are incident to the business in which he voluntarily engages, is well settled and undisputed." In the *Burchard* Case it was held that, as the danger was not so obvious as to warrant the court in declaring as a matter of law that the deceased assumed the risk, the question was properly submitted to the jury.

The court in instruction No. 10 charges the jury that if at the time Warring met his death he was riding in such a position upon the engine as head breakmen usually assume in the discharge of their duty, and that such place was a reasonably safe one for the brakeman to assume, then the mere fact of his riding in the engine would not be such contributory negligence as to defeat a recovery. This instruction, it is said, ignores the company's rules, and is erroneous, "in that it permits the jury, without appropriate proof, to abrogate the company's rule for the benefit of the deceased, and to make the deceased servant himself the judge of the circumstances under which he was under the duty of allegiance to the rule." Counsel say: "It is perfectly true that an employer's rule may be suspended, or, indeed, abrogated, provided it is customarily violated with the knowledge or assent, express or implied, of the officers of the company." But we have no rule of the company before us. No rule of the company was offered in evidence, nor was any instruction tendered covering the subject.

Instruction No. 12 declares that if the jury should find that the defendant, in the exercise of reasonable and ordinary care, could not have discovered that the rock in question was liable to fall upon its track, then the plaintiff is not entitled to recover, unless it further finds that the defendant was negligent in not properly inspecting its track prior to the passage of the train, and

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employees in charge thereof against such dangers as caused Warring's death, and did not so protect the train upon which Warring was riding, and Warring was killed by reason thereof, then your verdict should be for the plaintiff, unless you further find from all the evidence that he was guilty of contributory negligence which materially contributed to his death, or that he assumed the risk." It is insisted that this instruction, aside from erroneously assuming certain conditions to have been shown by the evidence, submits to the jury the question whether the company should have employed track walkers immediately ahead of the particular train on which the deceased rode. It was the duty of the company to use such means as were necessary to maintain its track and roadbed in such condition that they were reasonably safe for the passage of trains. That the track of the company was not in condition for the passage of the train on which Warring rode cannot, of course, be disputed. It was shown by the testimony that the company had made no inspection of the track for about six hours prior to the accident. If the duty of patrolling the track or making such other inspection for the purpose of protecting the passage of its trains devolves upon the company, it devolves upon it to protect each train, and the statement contained in the instruction, "and did not so protect the train upon which Warring was riding," we do not regard as erroneous. The instruction is supported by the evidence, and no error was committed in so charging the jury.

In instruction No. 8 this clause is found: "And if you find from all the evidence * * * that the defendant company, in the exercise of ordinary care, prudence, and foresight, could have reasonably apprehended that boulders were liable to roll down from the mountain side onto the track, and that any track walkers in that immediate vicinity, in passing over the point in question in front of this train, might have discovered that the boulder or rock had rolled down * * * and warned the train in time to have avoided the injuries." Counsel say that by the use of the word "might" a higher degree of care was required of the company than the law imposes. We do not think the jury was misled into granting a verdict for the plaintiff upon the theory that the company was liable if by any possible contingency it could have discovered the rock in question in time to have warned the train upon which Warring was riding. The use of the words "might have discovered," etc., have no greater significance, we think, than the words "would have discovered," taken in connection with the testimony and the other instructions. Moreover the defendant used the same expression in an instruction tendered by it. The testimony showed that the company, although it ran trains at night, did not provide for the inspection of its track at night; that no employee of the company had been over the track after about 5 o'clock in the afternoon previous to the derailment of the engine. Whether the failure to inspect its track was or was not negligence was a question for the jury to determine, and

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the jury was told that if it found from the evidence that in the exercise of ordinary care on the part of the defendant company to protect the passage of its trains it was necessary to have track walkers in front of this train in order to protect it and the employees in charge thereof, and that there were no such night track walkers or night inspection, and that by reason thereof Warring met his death, "then your verdict should be for the plaintiff, unless," etc.

In instruction No. 9 the jury was told that it should decide whether the defendant had or had not assumed the risk of a boulder rolling down the mountain side and injuring the track. The court observed that the law excuses a master when the injury results in the servant from the ordinary hazards which are incident to the nature of the employment, and not from a cause which the master, by the exercise of proper care and prudence, could have foreseen and guarded against. In the recent case of *D. & R. G. R. Co. v. Burchard* (not yet officially reported), 86 Pac. —, this court quoted with approval from *Yeaton v. Boston & Lowell Railroad*, 135 Mass. 418, the following: "The general rule of law, that a servant takes upon himself the risk of the dangers which ordinarily attended or are incident to the business in which he voluntarily engages, is well settled and undisputed." In the *Burchard Case* it was held that, as the danger was not so obvious as to warrant the court in declaring as a matter of law that the deceased assumed the risk, the question was properly submitted to the jury.

The court in instruction No. 10 charges the jury that if at the time Warring met his death he was riding in such a position upon the engine as head brakemen usually assume in the discharge of their duty, and that such place was a reasonably safe one for the brakeman to assume, then the mere fact of his riding in the engine would not be such contributory negligence as to defeat a recovery. This instruction, it is said, ignores the company's rules, and is erroneous, "in that it permits the jury, without appropriate proof, to abrogate the company's rule for the benefit of the deceased, and to make the deceased servant himself the judge of the circumstances under which he was under the duty of allegiance to the rule." Counsel say: "It is perfectly true that an employer's rule may be suspended, or, indeed, abrogated, provided it is customarily violated with the knowledge or assent, express or implied, of the officers of the company." But we have no rule of the company before us. No rule of the company was offered in evidence, nor was any instruction tendered covering the subject.

Instruction No. 12 declares that if the jury should find that the defendant, in the exercise of reasonable and ordinary care, could not have discovered that the rock in question was liable to fall upon its track, then the plaintiff is not entitled to recover, unless it further finds that the defendant was negligent in not properly inspecting its track prior to the passage of the train, and

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that such negligence was the proximate cause of the injury. We do not regard this instruction as erroneous. It is not materially different from instruction No. 4, offered by the defendant.

The following appears in instruction No. 6: "The company should have used all reasonable precaution and ordinary care to secure the safety of its employees by keeping a sufficient force at command, and of sufficient capacity, to keep its roadway reasonably safe for the passage of its trains and the employees in charge thereof. It cannot, for want of watchfulness, expose its employees to unreasonable risk and escape liability, but the duty imposed is that of ordinary care. The ordinary care required must be measured by the danger of the service and proportioned by it." This is objectionable, it is claimed, because it advised the jury, in effect, that the sole and principal end and aim of the operation of a railroad is the safety of its employees. The instruction, in our opinion, is not erroneous. It is the duty of the railroad company to use all reasonable precaution to secure the safety of its employees, and to keep a sufficient force at command to keep its roadway reasonably safe for the passage of its trains and the employees in charge thereof, and this was what the court advised the jury.

One of the instructions offered by the defendant was modified. The modification consisted in inserting the word "ordinary" before the word "risk," so that the jury was advised that the deceased "assumed the ordinary risks and dangers due to the fact that the line ran along the foothills, and would of necessity be subject to the possibility of obstructions being cast upon the track from adjacent mountains." In the Burchard Case, cited, it was held that the employee assumes the ordinary risks of his employment, and we think there is no merit in the objection that the instruction offered was erroneously modified. The instruction was also modified by advising the jury that the deceased did not assume the risks arising from negligence or want of reasonable care on the part of defendant in inspecting its track or maintaining it in proper condition. Authorities cited with approval in the case of *D. & R. G. R. R. v. Burchard*, hold that the employee assumes the risks of the service in which he voluntarily engages, but does not assume the risks of the service caused by the employer's negligence. It is stated in *Colorado Central R. R. Co. v. Ogden*, 3 Colo. 502, cited with approval in *A., T. & S. F. R. R. Co. v. Farrow*, 6 Colo. 498, that the servant takes upon himself "the ordinary and usual hazard of his employment over which his employer has but little or no control, and against which he is best situated and best able to guard. Knowing the perils of the employment in which he engages, he is presumed to contract with reference to them, and to demand and receive a compensation which covers them. * * * Qualifying the foregoing rule is the further rule that risks arising from the negligence of the master are not included among those which the servant is presumed to as-

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sume." The modifications have the support of the decisions of this court, and are not erroneous. Moreover, in request No. 11 the court gave a similar instruction.

The charge to the jury is quite long and shows evidence of much care in its preparation. On the whole it is fair and just to the defendant. The case is fairly covered by the instructions given, and no error is perceived in refusing instructions offered by defendant. The jury must have found that it was necessary for the defendant, in the exercise of ordinary care and prudence, to guard against an injury to its track such as occurred.

For the reasons given, the judgment is affirmed.

The CHIEF JUSTICE and CAMPBELL, J., concur.

HAYES v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, April 24, 1906.)

[53 S. E. Rep. 847.]

Railroads—Injuries to Trespassers—Trial—Presentation of Issues.

—In an action against a railroad for injuries received by plaintiff, a trespasser on defendant's train, through being ejected therefrom, it was not reversible error to submit all three issues: First, was plaintiff injured by the negligence of defendant? Second, was plaintiff injured by defendant negligently, wantonly, and forcibly ejecting him from its moving train as alleged in the complaint? Third, what damages is plaintiff entitled to recover, if any? although the case could have been presented under the first and third issues.

Same—Ejection from Train.*—A trespasser on a railroad train attempting to perpetrate a fraud on the road by beating his way with the connivance of the railroad's brakeman at the start, may recover damages of the road for the violence of the brakeman in forcing him from the train, whereby he is injured.

Same—Liability for Acts of Brakeman.*—It being within the scope of the agency of a brakeman on a freight train to eject trespassers therefrom, the railroad is responsible for his conduct in ejecting a trespasser in an unlawful and violent manner, thereby endangering life or limb.

Same—Proximate Cause.†—Where plaintiff, a trespasser on defendant's train, was forcibly ejected therefrom by defendant's brakeman,

*For the authorities in this series on the subject of the liability of a railroad for the improper manner in which a trespasser is ejected from a train, see foot-notes appended to *Dixon v. Northern Pac. Ry. Co.* (Wash.), 14 R. R. R. 619, 37 Am. & Eng. R. Cas., N. S., 619; foot-notes appended to *McKeon v. New York, etc., R. Co.* (Mass.), 8 R. R. R. 375, 31 Am. & R. Cas., N. S., 375.

†For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng.

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while the train was moving rapidly, and in falling, struck a clearance post by the side of the track, and was thereby thrown under the car wheels and injured, the wrongful act of the brakeman was the proximate cause of the injury.

Negligence—Proximate Cause—What Constitutes.†—The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence would foresee might naturally or probably produce injury, and the second requisite is that it did produce it.

Railroads—Ejection of Trespassers on Train—Punitive Damages.‡—Where defendant railroad's brakeman wantonly and violently ejected plaintiff, a trespasser on its train, therefrom, while the train was rapidly moving, whereby plaintiff was injured, the jury were authorized to award punitive damages.

Damages—Punitive Damages.†—The jury cannot allow punitive damages unless they conclude from the evidence that the wrongful act resulting in the injuries occasioned plaintiff, was accompanied by fraud, malice, recklessness, oppression or other willful and wrongful aggravations on defendant's part.

Railroads—Trespassers Ejected from Train—Punitive Damages.‡—Where, in ejecting a trespasser from a train, a brakeman acting for the railroad, and within the scope of his agency, the general principles of law relating to punitive damages apply to him as well as to the train conductor.

Damages—Instructions.—In an action against a railroad for injuries to a minor, an instruction that the jury might allow for damages and loss occasioned plaintiff by reason of his total disability to work, while totally disabled, and for partial disability, since then, etc., was erroneous as permitting recovery by plaintiff for loss of work from the time of the injury until he came of age, as, until such time, plaintiff's father was entitled to his earnings.

Appeal from Superior Court, Guilford County; Cooke, Judge.

Action by Glenn Hayes, by his next friend, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Partial new trial.

Action to recover damages for forcible ejection from the defendant's train. The court submitted the following issues: (1) Was the plaintiff injured by the negligence of the defendant? Ans. Yes. (2) Was the plaintiff injured by the defendant company negligently, wantonly, and forcibly ejecting him from its moving train, as alleged in the complaint? Ans. Yes. (3)

R. Cas., N. S., 775; Chicago City Ry. Co. v. Shaw (Ill.), 18 R. R. R. 586, 41 Am. & Eng. R. Cas., N. S., 586; foot-notes appended to Brammer's Adm'x v. Norfolk & W. Ry. Co. (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

†See foot-note on preceding page.

‡For the authorities in this series on the question when exemplary or punitive damages are, and are not, recoverable, see foot-notes appended to Chicago Union Traction Co v. Lauth (Ill.), 17 R. R. R. 606, 40 Am. & Eng. R. Cas., N. S., 606.

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What damages is the plaintiff entitled to recover, if any? Ans. \$1,800. To the second issue the defendant excepted. From the judgment rendered defendant appealed.

King & Kimball, for appellant.

Brooks & Thompson, for appellee.

BROWN, J. 1. The second issue was unnecessary. The entire case could have been presented under the first and third issues, or, in view of the evidence, it could have been better presented under the second and third issues without the first. But it is not reversible error to have submitted all three.

2. The evidence is somewhat conflicting; but plaintiff's evidence tended to prove that plaintiff, a 17 year old boy, boarded a mixed freight and passenger train at Greensboro for the purpose of riding to Summerfield; that he and the brakeman sat down on top of a box car side by side, and rode a couple of miles when the brakeman ordered plaintiff to get off the train, cursing him, and using violent and threatening language; that the plaintiff remonstrated, saying that he was willing to get off if he would stop the train, and agreeing to do so when the train stopped at the Battle Ground, the next station; that the brakeman continued cursing, drove him from the top of the train down the ladder along the side of the train, and followed him, stamped on his fingers and finally drove him from the train, causing him to fall, when his leg struck the clearance post, which threw him under the wheels of the car, crushing off his right leg, and severely mashing his left foot. The brakeman, according to the testimony of all the witnesses, was on duty as brakeman, and was in the discharge of his usual duties as brakeman at the time of the occurrence. All the evidence discloses that plaintiff was a trespasser and wrongfully on defendant's train, and that he was attempting to perpetrate a fraud on defendant by beating his way on top the car, with the brakeman's connivance at the start. Yet it seems that under our authorities he may recover damages of the defendant for the violence of the brakeman, although the plaintiff could not recover had he been injured in an accident resulting from negligence, for the company owed him no duty as a passenger. It is said in *Pierce v. Railroad*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316, that "a trespasser's wrongful act in getting on a car does not justify making him get off in a manner calculated to kill or cripple him." To the same effect is *Lewis v. Railroad*, 132 N. C. 382, 43 S. E. 919; *Cook v. Railroad*, 128 N. C. 333, 38 S. E. 925, and authorities therein cited.

3. It was within the scope of the brakeman's agency to eject trespassers from the train, and therefore it follows that if he did it in an unlawful and violent manner, thereby endangering life or limb, the defendant is responsible for his conduct. This is so held in *Cook's Case*, *supra*, and many other cases. In the case of *Hoffman v. R. R.*, 87 N. Y. 25, 41 Am. Rep. 337, the Court of Appeals of New York says: "In this case the authority

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to remove the plaintiff from the cars was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own." *Higgins v. R. R.*, 46 N. Y. 23, 7 Am. Rep. 293; *Rounds v. R. R.*, 64 N. Y. 129, 21 Am. Rep. 597; *Railroad v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33. See, also, authorities collected in 62 Am. Rep. 381.

4. The jury accepted the plaintiff's version of the facts by answering the issues in his favor. According to this the undoubted and immediate cause of the injury was the wrongful conduct of the brakeman in forcing plaintiff off a rapidly moving train. The fact that the plaintiff struck the clearance post on the track and was thrown under the wheels does not make the brakeman's act any the less the proximate cause of the injury. The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and the second requisite is that it did produce it. *Brewster v. Elizabeth City*, 137 N. C. 395, 49 S. E. 885. The brakeman must have foreseen the great danger to the life and limb of the plaintiff in violently forcing him off a rapidly moving freight train, and but for his act the injury could not have occurred. That it was the direct cause would seem to admit of no doubt.

5. It seems from the authorities that, although the wrongful act was committed by a brakeman, the jury may in the exercise of a sound discretion, under plaintiff's version of the evidence in this case, if believed, award punitive damages, if they see proper to do so. They are not obliged to award them in any case, and should look carefully into the facts and circumstances before doing so. Mr. Thompson says if the agent of the carrier maliciously uses unnecessary force in ejecting a trespasser, it may be a case for exemplary damages. 3 Thompson on Neg. (2d Ed.) § 3263. This court has said in many cases that punitive damages may be allowed, or not, as the jury see proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury. *Knowles v. Railroad*, 102 N. C. 59, 9 S. E. 7, and cases cited. Punitive damages have been allowed by the courts for the wrongful and violent conduct of brakemen (*Hanson v. R. R.*, 62 Me. 84, 16 Am. Rep. 404; *Goddard v. R. R.*, 57 Me. 202, 2 Am. Rep. 39; *R. R. v. Condor*, 75 Ga. 51); also of engineers (*Cobb v. R. R.*, 37 S. C. 194, 15 S. E. 878). It would seem from the authorities that where the brakeman is acting for the company, and within the scope of his agency, the general principles of the law relating to exemplary or punitive damages apply to him as well as to the conductor.

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6. Upon the issue of damages the court instructed the jury that "if they come to consider the third issue, they shall allow for damages the loss of the plaintiff by reason of his total disability to work, while totally disabled, and for partial disability, since then," etc. We think this instruction contains error in that it permitted the jury to allow plaintiff for loss of work from the time of the injury until he comes of age. It is elementary law that the father is entitled to his child's earnings until the child becomes of age. For this error we award a new trial upon the issue of damages.

Partial new trial.

ERIE R. CO. v. FARRELL et al.

(Circuit Court of Appeals, Second Circuit, May 22, 1906.)

[147 Fed. Rep. 220.]

Trial—Direction of Verdict—Conflicting Evidence.—Where there is a direct conflict of evidence on an issue the court is not justified in taking such issue from the jury, who are the judges of the credibility of the witnesses, because the testimony on one side largely preponderates.

Railroads—Injury to Person at Crossing—Violation of Speed Ordinance.*—The violation by a railroad company of an ordinance regulating the speed of trains is not conclusive evidence of negligence, but in an action for an injury at a crossing is to be submitted to the jury as a circumstance from which negligence may be inferred.

In Error to the Circuit Court of the United States for the Southern District of New York.

F. B. Jennings, for plaintiff in error.

J. B. Ker, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The assignments of error challenge the refusal of the trial judge to direct a verdict for the defendant upon the ground that the evidence established the contributory negligence of the plaintiff, and his instructions to the jury upon the question of the negligence of the defendant.

The testimony of the plaintiff that he was struck by the locomotive of the defendant's train as he was attempting to cross the tracks of the defendant at Monmouth street, and when the approaching train was intercepted from his view by another train which had passed him while he was waiting to cross, and the rest of his testimony bearing upon the question of contributory negli-

*See foot-notes appended to *Bresee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Kansas City, etc., R. Co. v. Williford* (Tenn.), 19 R. R. R. 549, 42 Am. & Eng. R. Cas., N. S., 549.

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gence made, as this court observed upon a former occasion (138 Fed. 28), "an improbable, but not an impossible, case," and was overwhelmingly contradicted by the evidence introduced by the defendant. Nevertheless the question of his credibility was one for the jury, and if his testimony was true it would have been error for the trial judge to take the case from their consideration.

The trial judge in his charge to the jury upon the question of the negligence of the defendant in effect instructed them to find upon this issue in favor of the plaintiff, because the evidence was uncontradicted that the train of the defendant was moving at a speed in excess of that permitted by the city ordinance. He refused to instruct them, as requested by the defendant, that the defendant's failure to comply with the ordinance did not in itself constitute conclusive proof of negligence, and that it was for the jury to say, in view of the situation and surroundings in that part of the city and all the circumstances, whether the failure to comply was negligence.

The rule established by the weight of authority is, that the violation of the ordinance is not conclusive evidence of negligence, but is to be submitted to the jury as a circumstance from which negligence may be inferred. *Grand Trunk Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Hanlon v. South Boston Railroad*, 129 Mass. 310; *Knipple v. Ice Co.*, 84 N. Y. 490.

The crossing was at the outskirts of the city, was rarely used, and the approaches to it afforded an unobstructed view for a long distance of a train approaching from any direction; and it could only be owing to an extraordinary and almost impossible combination of circumstances that a person using it would be endangered or embarrassed in the least degree by the omission of the defendant to conform strictly to the ordinance.

The instructions given and refused, deprived the defendant of the benefit of a meritorious defense, and the assignments of error based upon the exceptions to the rulings are well taken.

The judgment is reversed.

HODGIN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 13, 1906.)

[55 S. E. Rep. 413.]

Jury—Qualification of Jurors—Freeholders.—A husband, whose wife is seized in fee of real estate and is the mother of children by him, is a freeholder and eligible as a juror, notwithstanding Const. art. 10, § 6, providing that the property of any female acquired before or after marriage, shall remain her separate estate, and may be devised, and with the written assent of her husband, conveyed by her as if she were unmarried.

Appeal—Challenges to Jurors—Harmless Error.—The error of the court, in allowing a party's challenge of a juror, is not prejudicial to the adverse party, who did not exhaust his peremptory challenges.

Railroads—Injury to Persons on Track—Care Required at Crossings.*—A traveler, approaching a railway crossing at which the railroad keeps a flagman for the purpose of warning travelers, who discovers that the flagman is absent, is put on his guard, and must look and listen for the approach of trains, and exercise ordinary care for his own safety.

Appeal from Superior Court, Guilford County; Moore, Judge.

Action by James A. Hodgin, by his next friend, against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action to recover damages for injuries received by plaintiff from a collision with defendant's train at a crossing. The court submitted the issues of negligence, contributory negligence, and damage. The jury found the issue of contributory negligence against the plaintiff. From the judgment rendered plaintiff appealed.

John A. Barringer, for appellant.

King & Kimball, for appellee.

BROWN, J. One of the jurors was challenged by defendant upon the ground that he was not a freeholder. The challenge was allowed, and plaintiff excepted. The juror owned no land, but his wife was seised of a fee, and had children by her husband. While the Constitution, art. 10, § 6, has wrought very material and far-reaching changes as to the rights and dominion of the wife over her separate property, it seems, nevertheless,

*For the authorities in this series on the subject of the duties and liabilities of railroads as affected by the presence or absence of flagmen or watchmen at crossings, see foot-notes appended to *Brooks v. Boston & M. R. R.* (Mass.), 19 R. R. R. 526, 42 Am. & Eng. R. Cas., N. S., 526; *Cowen v. Dietrick* (Md.), 17 R. R. R. 359, 40 Am. & Eng. R. Cas., N. S., 359; *Schwartz v. Delaware, etc., R. Co.* (Pa.), 16 R. R. R. 441, 39 Am. & Eng. R. Cas., N. S. 441.

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to have been held by this court that the husband still has what is termed an "interest" in her land which constitutes him technically a freeholder. In *Thompson v. Wiggins*, Mr. Justice Clark said of the husband, "by reason of such bare seisin he is still a freeholder, and as such has always been deemed eligible as a juror in those cases in which being a freeholder is a qualification." 109 N. C. 510, 14 S. E. 301. Although it is said in *Walker v. Long*, 109 N. C. 510, 14 S. E. 299, that the husband has no estate in his wife's land until after her death, being intestate, yet Mr. Justice Merrimon says: "But he has an interest as tenant by the curtesy initiate" and cites *Thompson v. Wiggins*. The same case is also cited with approval by Mr. Justice Avery in *Jones v. Coffey*, 109 N. C. 518, 14 S. E. 84. While much may be said to the contrary, we think it best to adhere to the former decisions of the court. The exception, however, cannot be sustained, and will avail the plaintiff nothing as he did not exhaust his peremptory challenges. *State v. Teachey*, 138 N. C. 592, 50 S. E. 232; *McDowell's Case*, 123 N. C. 768, 31 S. E. 839; *Hensley's Case*, 94 N. C. 1021. We, however, notice the matter briefly in order to set it at rest.

Inasmuch as the jury found the issue of negligence in favor of the plaintiff, it is unnecessary to consider the numerous exceptions in the record to the admission and rejection of evidence, and to the charge of the court, which bear only upon that issue.

The only exception we deem it necessary to notice relates to the charge of the court upon the issue of contributory negligence. The defendant offered evidence tending to prove that plaintiff had been to Greensboro on horseback, and was returning home about 11 o'clock at night; that, as he approached the railroad crossing, he did not pay any attention or exercise any care; that he had been drinking, and was under the influence of liquor, and either ran into a passing train, or else the train ran into him. There was evidence tending to prove that the company had kept a flagman stationed immediately at this crossing for the purpose of warning passersby, and that plaintiff knew of this custom. It is stated in appellant's brief and is in evidence that when plaintiff got near the railroad crossing he looked for the watchman, but saw none. It is contended by the plaintiff that, as he looked for the usual watchman and saw none, he had a right to cross the track, and was absolved from the usual duty of looking and listening, and that his honor erred in refusing to so charge. For this position plaintiff relies upon *Russell v. Railroad*, 118 N. C. 1109, 24 S. E. 512. We do not think the citation gives any support to plaintiff's contention. We do not gainsay the proposition that where a railroad company keeps gates at a crossing for the protection of the public, and the gates are opened, it is an invitation to enter and cross the track. The company then assumes the care and protection of the passers. But if the passer sees when he gets near the track that the usual gates are gone, he is at once put on his guard, and he

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should look and listen for passing trains before crossing. The same rule applies when a watchman is stationed at the crossing to give warning. The traveler who sees the watchman in his place has the right to rely on him for protection, but when he discovers that the watchman is absent from his post of duty, he is put on his guard at once, and must exercise ordinary care to protect himself from injury. He should himself then look and listen for passing trains. It is true, the watchman is guilty of negligence when he deserts his post, but when this negligence was discovered by plaintiff it made it all the more incumbent upon him to look and listen for his own protection for he had ample time to do so. There would be more in plaintiff's contention had he proceeded to cross the track before he discovered that the watchman was absent, relying upon the protection which he supposed the watchman was giving him.

We have examined his honor's charge, and especially that portion relating to contributory negligence. In explaining to the jury the relative rights and duties of railroad companies and travelers at surface crossings, his honor quoted extensively from Mr. Justice Bradley's lucid opinion in *Improvement Company v. Stead*, 95 U. S. 161, 24 L. Ed. 403. The charge is also fully sustained by the principles laid down in *Norton v. Railroad*, 122 N. C. 928, 29 S. E. 886; *Cooper v. Railroad*, 140 N. C. 209, 52 S. E. 932; *Parker v. Railroad*, 86 N. C. 221; *Richmond v. Chicago*, 87 Mich. 374, 49 N. W. 621; and *Merrigan v. Railroad*, 154 Mass. 189, 28 N. E. 149.

The judgment of the superior court is affirmed.

COY v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas, July 6, 1906.)

[86 Pac. Rep. 468.]

Railroads—Injury to Person on Track—Contributory Negligence.*

—One who walks or stands on a railroad track in a street when there is no necessity or occasion for doing so, is guilty of contributory negligence, barring recovery for injury from a moving car not knowingly or wantonly caused.

Negligence—Contributory Negligence—Children.†—One's recovery

*See foot-notes appended to *Gulf, etc., R. Co. v. Matthews* (Tex.), 20 R. R. R. 573, 42 Am. & Eng. R. Cas., N. S., 573.

†For the authorities in this series on the question whether children can be chargeable with contributory negligence, see foot-notes appended to *Birmingham, etc., Co. v. Hinton* (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173; foot-notes appended to *Goldstein v. People's Ry. Co.* (Del. Supr. Ct.), 19 R. R. R. 529, 42 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154.

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for injury by negligence in the operation of a train is barred by contributory negligence though he is only 12 years old, his testimony showing a degree of intelligence, a knowledge of the methods of operating trains, and an appreciation of the danger to which his situation exposed him, such as might be looked for in a person of full maturity.

Error from District Court, Allen County; Oscar Foust, Judge.

Action by Clarence E. Coy against the Missouri Pacific Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

E. W. Myler and Ewing, Gard & Gard, for plaintiff in error.

J. H. Richards, C. E. Benton, and Campbell & Goshorn, for defendant in error.

PER CURIAM. Clarence L. Coy, the son of Clarence E. Coy, was seriously injured by being run into by a car of the Missouri Pacific Railway Company. His father brought an action against the company to recover damages. Upon the trial the court sustained a demurrer to the evidence of the plaintiff, who prosecutes error.

The evidence showed that a freight car was standing upon a side track laid along a public street in Iola, and was being unloaded. Several drays were standing near the car, and the boy, seeing them from a distance, came that way for the purpose of getting a ride on one of them. At a distance of about 40 feet from the car he went upon the track on which it stood, and walked between the rails until he had almost reached it. He then stooped over to gather some snow that lay on the track. At this moment a train, or a part of a train, was backed against the car from the other side, giving it a sudden impetus towards him. It struck him, knocked him down, and dragged him for some distance, breaking his arm and inflicting other injuries. There was evidence that no warning was given of the approach of the train, and the negligence of the company in that respect may be regarded as established. The demurrer was obviously sustained, upon the theory that the boy's own negligence contributed to his injury and precluded a recovery. Former decisions of this court and of other courts have established the doctrine that it is negligence as a matter of law for one to walk or stand upon a railroad track when there is no necessity or occasion for so doing, and that no recovery can be had for any injuries received under such circumstances from a moving car or engine, not knowingly or wantonly caused. *Railway Co. v. Schwindt*, 67 Kan. 8, 72 Pac. 573; *Zirkle v. Railway Co.*, 67 Kan. 77, 72 Pac. 539; *Railway Co. v. Withers*, 69 Kan. 620, 77 Pac. 542, 78 Pac. 451.

In the present instance the boy was not crossing the track, and there is no reason why he should have been upon it when the car was struck. The car itself prevented his seeing the ap-

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proaching train. The case clearly falls within the doctrine stated unless this result is prevented by the consideration that the injured boy was but 12 years old. His age, however, is important only as a mark of capacity. *Bess v. Railway Co.*, 62 Kan. 299, 62 Pac. 996. Whatever view might otherwise be taken of the matter the boy's own testimony forbids any relaxation of the rule by reason of his tender years, for it shows a degree of intelligence, a knowledge of the methods of the operations of trains, and an appreciation of the danger to which his situation exposed him, such as might be looked for in a person of full maturity. This is illustrated by his statements that he didn't think the railroad employees would couple onto the car while it was being unloaded; that he did while standing on the track lean over and look past the car to see if there was any engine there, seeing several cars, but no engine; that he didn't think if a train should strike the cars that it would knock them very far; and that when the car bumped back he jumped backwards, thinking it would not move very far.

We think the trial court ruled correctly, and the judgment is affirmed. All the Justices concurring.

TOLEDO, ST. L. & W. R. R. v. STAR FLOURING MILLS CO.

(Circuit Court of Appeals, Sixth Circuit, July 10, 1906.)

[146 Fed. Rep. 953.]

Railroads—Fires—Evidence as to Condition of Spark Arrester.*—

In an action against a railroad company to recover for the loss of property alleged to have been set on fire and burned by sparks from a locomotive engine on defendant's road where witnesses for defendant testified that the engine was equipped with the most approved kind of spark arresting device, and that the same was in good condition, plaintiff was entitled to show in rebuttal of such testimony that on the same day ten fires were caused by sparks from the same engine within two miles of plaintiff's property and by the testimony of experts that such fact would indicate that the spark arrester was not in good condition.

Same—Action under Ohio Statute—Burden and Measure of Proof.

—Under the provision of Rev. St. Ohio 1906, § 3365-6, which makes the fact that a fire was set to property adjacent to a railroad by sparks escaping from a locomotive prima facie proof of the railroad company's negligence, in an action to recover for the loss of such property, the company is not required in order to overcome such

*See foot-notes appended to *Hendricks v. Southern Ry. Co.* (Ga.), 18 R. R. R. 503, 41 Am. & Eng. R. Cas., N. S., 503; foot-notes appended to *Shelly v. Philadelphia & R. Ry. Co.* (Pa.), 17 R. R. R. 835, 40 Am. & Eng. R. Cas., N. S., 853; note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

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prima facie case to produce a preponderance of the evidence bearing on the question of negligence, but it is sufficient if it produce enough to counterbalance that by which the prima facie case is made out, the ground of recovery under the statute as under the common law being negligence the burden of proving which rests upon the plaintiff.

Error to the Circuit Court of the United States for the Northern District of Ohio.

This was an action brought by the defendant in error against the plaintiff in error to recover damages for the destruction by fire of the plaintiff's flouring mill and contents at Venedocia, Ohio. The petition is drawn under section 3365-6 Rev. St. Ohio 1906, and alleges that the fire which destroyed the mill was caused by sparks emitted by a locomotive drawing a train of freight cars on defendant's railway. The answer was a general denial, coupled with special averments that the locomotive in question was equipped as required by the statute, and carefully operated by skillful and competent employees. At the close of all the evidence the plaintiff in error moved for a peremptory instruction for a verdict in its favor. This motion was overruled, and this has been assigned as error. The case was then submitted to a jury, who were required to answer certain interrogatories propounded by the court. These interrogatories and the answers of the jury were as follows:

By the Court: Gentlemen of the jury, I am asked to submit to you certain questions, which I do, and which you will answer, as indicated to you by the court:

(1) "Do you find that the fire which consumed the plaintiff's property originated from a spark emitted by one of defendant's locomotives?" That question you will answer, and by your foreman sign.

(2) "If you answer interrogatory No. 1 in the affirmative, do you find that the locomotive which set said fire was engine 66, attached to defendant's through freight train No. 42?" That will be answered similarly.

(3) "Do you find that said engine 66 was at the time of the fire equipped with a spark arresting device of the best and most effective pattern known or in use at the date of said fire?" You must answer that question, although it is not couched in the language which the law provides shall be descriptive of such a spark arrester."

(4) "Do you find that the said spark arresting device on said engine was at the time of the fire in good repair?" You may answer.

(5) "Do you find that the defendant's employees in charge of and operating said engine at the time of the fire were competent and skillful?" You will answer.

(6) "Do you find that the defendant's said employees in charge of said engine at the time of the fire were at such time operating the engine in a careful manner?" All of these questions, gentlemen, you may answer according to the fact.

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Clarence Brown, for plaintiff in error.

O. S. Brumback and H. L. Conn, for defendant in error.

Before LUPTON, SEVERNS, and RICHARDS, Circuit Judges.

LUPTON, Circuit Judge, after making the foregoing statement, announced the opinion of the court.

In respect of the error assigned upon the refusal of the court to instruct a verdict for the plaintiff in error, it is only necessary to say that a careful examination of the record convinces us that there was material evidence upon which the jury might find as they did; that the fire which consumed plaintiff's mill was started by sparks emitted from a locomotive in operation upon the defendant's railway. Under the Ohio statute, which will be later considered, the effect of proof that the fire was started by sparks from a passing engine was to make that fact *prima facie* evidence that the escape of sparks was due to negligence and the burden was thus cast upon the defendant to rebut or counterbalance the presumption. In view of the finding by the jury that the spark arrester was of the best and most effective make and that the servants of the company operating the engine, efficient and skillful, we need not discuss either of those matters, for the refusal to instruct the jury to find for the plaintiff on those parts of the case did no harm. There remains then, only the question of whether this spark arresting device was in good condition upon the day when this fire was started. The jury found that it was not, and we are not at all disposed to think that there was not evidence sufficient to carry that question to the jury. That there was substantial, uncontradicted evidence that the netting of this particular engine had been replaced by new netting 30 days before the fire, and that the average life of such netting was from 6 to 18 months, must be conceded.

The servants of the railroad company also testified that this netting was inspected on the night before the fire, and again within one-half hour after the fire, and found to be in good condition. There was also uncontradicted evidence from competent experts that no spark arresting device will prevent the escape of all sparks and at the same time leave draft enough to operate the engine. To rebut this evidence of good repair the plaintiff relied, first, upon evidence tending to show that no less than 10 fires in grass and hay and stubble had been started by this very engine on the day in question within two miles of plaintiff's mill. There was also expert evidence to the effect that the fact that the same engine started 10 fires within two miles upon the same day and trip would indicate something wrong with the arrester. This testimony was admitted over the objection of the defendant in error, but we think it was competent to go to the jury as to the question of the condition of the arrester. *Peck v. N. Y. C. R. R.*, 165 N. Y. 347, 59 N. E. 206. The jury were not bound to accept the evidence of the inspector and other servants of the defendant as to the condition of the arrester if there

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was evidence tending to show that the sparks actually emitted in size and number were not such as could be anticipated if the condition of the arrester was as testified to. *Karsen v. M. & St. P. Ry.*, 29 Minn. 12, 16, 11 N. W. 122; *Carter v. Penn. R. R. Co.*, 120 Fed. 663, 57 C. C. A. 125; *Babcock v. C. & N. Ry.*, 62 Iowa, 593-597, 13 N. W. 740, 17 N. W. 909.

There remains the question as to whether the court erred in instructing the jury that the defendant could only escape liability if they should find that the plaintiff's mill had been burned by sparks from a passing engine by establishing by a "preponderance" of the evidence that its engine was provided with the best and most effective spark arrester, that it was in good condition, and that its engine was in care of competent and skillful men. The question is whether under the Ohio statute the *prima facie* case of negligence made by evidence that a fire was set by escaping sparks can only be rebutted by a preponderance of the evidence bearing upon the subject of negligence. At the common law the ground upon which the owner of the property consumed by fire, started upon or suffered to escape from the premises of another, could recover for such loss was negligence. This rule requiring the plaintiff to affirmatively show that the fire by which he suffered had resulted from a negligent act of the defendant, applied also to fires started by escaping sparks from locomotives of railway companies lawfully using such locomotives in the operation of their railways. *Garrett v. Southern Railway*, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; *Cincinnati Railway v. South Fork Coal Co.* (C. C. A.) 139 Fed. 528-531; *Shearman & Redfield on Negligence*, §§ 655-666; *St. L. Ry. Co. v. Mathews*, 165 U. S. 1, 15, 17 Sup. Ct. 243, 41 L. Ed. 611. There has always existed sharp conflict between decisions of eminent courts as to whether evidence that a fire was started by escaping sparks constituted, without more, a *prima facie* case of negligence. Upon the affirmative of this question was such cases as *McCullen v. C. & N. W. R. R.*, 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642; *Spaulding v. C. & N. W. R. R.*, 30 Wis. 110, 11 Am. Rep. 550.

In which case the Wisconsin court said:

"Some fire under all circumstances, and under even the best conditions of the engine to prevent it, will sometimes escape. The presumption, therefore, of negligence or the want of proper equipments, arising from the mere fact of fire having escaped, is not conclusive, nor, indeed, a very strong one, but of the two, rather weak and unsatisfactory. It is indulged in merely for the purpose of putting the company to proof and compelling it to explain and show, with a reasonable and fair degree of certainty, not by the highest and most clear and unmistakable kind of evidence, that it had performed its duty in this particular. Hence, evidence showing that the engines passing over a road were properly constructed and equipped, and were subjected to the vigilant and careful inspection of a competent and skillful person

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as often as once in two days, and found to be in proper order, would seem to satisfy the requirements of the rule."

See, also, *Menominee River Sash & Door Co. v. Milwaukee & Northern R. Co.*, 91 Wis. 459-460, 65 N. W. 176.

Upon the other hand there are many cases which seem to rest upon a more logical basis in holding that the gravamen of an action for loss of property by fire communicated by sparks, is negligence, and that inasmuch as a railway company may lawfully use locomotives it can not be made liable for a loss from sparks emitted, unless the plaintiff shows such sparks to have been negligently emitted, the burden of showing negligence being always upon him who affirms it. *Henderson v. Railway Co.*, 144 Pa. 461, 475, 476, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652; *Flinn v. N. Y. C., etc.*, R. R., 142 N. Y. 11, 19, 36 N. E. 1046. This was the view entertained by this court in a case originating in Tennessee, where there was no statute. *Garrett v. Southern Ry.*, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645. To the same effect are: *Burroughs v. Housatonic Rd.*, 15 Conn. 124, 38 Am. Dec. 64; *Gandy v. Chicago N. W. Rd.*, 30 Iowa, 420, 6 Am. Rep. 682.

There is a substantial agreement in all the cases, however, in holding that very slight evidence, such as proof that the sparks were of an unusual character in size, or in number, or that an unusual number of fires had been caused by sparks immediately before the fire in question, or that the defendant had been negligent in leaving upon its premises, in a very dry season, inflammable material, liable to be set on fire by the small sparks which inevitably escape under the most ordinary precautions, is enough to make a *prima facie* case of negligence demanding evidence of due care in rebuttal. Types of such cases appear in *Railway Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Flinn v. N. Y. C. & C. R. R.*, 142 N. Y. 11, 36 N. E. 1046; *Smith v. London, etc.*, R. R., 6 L. R. C. P. Cases 14; *Peck v. N. Y. C. R. R.*, 165 N. Y. 347, 59 N. E. 206; *Burke v. Railroad*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Huyett v. Railroad*, 23 Pa. 373; *Henderson v. Railroad*, 14 Pa. 461, 477, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652. For the principles applicable to fires originating from collisions on a railroad track, see *C. S. Ry. Co. v. South Fork Coal Co.* (C. C. A.) 139 Fed. 528. In some of the states the statutes impose a liability unless the defendant company shall prove that the sparks escaped without negligence and that it was in all respects free from censure. Among the states having such statutes are Vermont, Michigan, Iowa, Louisiana. See *Railroad v. Richardson*, 91 U. S. 456, 23 L. Ed. 356; *Ann Arbor Rd. Co. v. Fox*, 92 Fed. 494, 34 C. C. A. 497; *Small v. C. R. I. Rd. Co.*, 50 Iowa 338.

In Ohio the statute makes a railway company absolutely liable, irrespective of negligence, for a fire started upon its own premises, in the operation of its railway, by which adjacent property is destroyed. By another provision of the same act, the fact

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that fire was communicated by sparks from an engine to property adjacent to the railway right of way is made *prima facie* evidence of negligence. In other states absolute liability for fire communicated by sparks is imposed regardless of any actual negligence. Among such statutes are those of Missouri, Massachusetts, Maine, New Hampshire, Connecticut, Colorado, South Carolina. For the terms and dates of these statute the very elaborate opinion of Justice Gray in *St. Louis, etc., Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, in which the constitutionality of the Missouri statutes was vindicated, may be consulted.

In *Railway Company v. Kreager*, 61 Ohio St. 313, 56 N. E. 203, the Ohio statute here involved, and to which we refer above, was under construction. Its provisions, so far as they have any bearing upon the decision in that case, have been already substantially stated. The syllabus of the case is as follows:

"1. The act of April 26, 1894 (91 Ohio Laws, p. 187), imposes upon every railroad company operating a railroad or part thereof in this state, an absolute liability for loss or damage by fire, originating on its land, caused by operating the road; and the fact that the fire originated on the land of the company is made *prima facie* evidence that it was caused by operating the road. In an action for such loss or damage, it is not necessary to allege or prove negligence on the part of the company; nor is the absence of such negligence a defense.

"2. A different rule of liability, and of evidence, is provided by the act, where the loss or damage is caused by fire originating on land adjacent to the land of the railroad company. In such cases the company is liable only when the fire was caused in whole, or in part, by sparks from an engine on or passing over the road; and the fact that the fire was so caused is made *prima facie* evidence of negligence on the part of the company or person operating the road. But this *prima facie* case of negligence

company exercised due care, the burden being on the company to show that it was free from negligence."

The question as to whether the *prima facie* case made for the plaintiff might be rebutted or overbalanced by the evidence offered by the party upon whom the burden had been thus shifted was not involved. "No evidence," said the court in its opinion, "was offered to show the defendant exercised due care and the only instruction asked" (in reference to the care for a loss occasioned by sparks from an engine to property adjacent to right of way) "was: 'That unless the jury find the injury complained of resulted from the carelessness and negligence of the defendant in running and operating its road, then the verdict should be for the defendant.'" In the absence of any evidence to rebut the presumption of negligence from the fact that the fire was communicated by sparks from a passing engine the plaintiff was plainly entitled to a verdict.

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In the case of Klunk v. Hocking Valley Railway Company (Ohio) 77 N. E. 752, the action involved a construction and application of 3365-21, Rev. St. Ohio 1906, by which it is provided that if an employee shall receive an injury by reason of any defect in any car, locomotive or machinery owned or operated by such corporation, "such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state brought by such employee or his legal representatives, against any railroad corporation for damages on account of such injury so received, the same shall be *prima facie* evidence of negligence on the part of such corporation." It appeared that the injury resulted from an alleged defect in a water glass upon a locomotive upon which plaintiff was employed as engineer.

The trial judge charged the jury on the subject of burden of proof as follows:

"If you find from the evidence that said water glass was then and there defective, and that the plaintiff received said injuries in consequence thereof, then such is *prima facie* evidence of negligence on the part of the defendant. This, however, does not preclude the defendant from rebutting such *prima facie* evidence of negligence by showing that it had not knowledge of the defect and that it was not guilty of negligence. In order to overcome such presumption, the defendant must show by a preponderance of the evidence, that it did not, at the time of the bursting and breaking of said water glass, have such knowledge, and that it could not have obtained such knowledge by the use of ordinary care, skill and diligence."

The Supreme Court, among other things, in respect of the meaning of this statute, said:

"But while the effect of this statute in the cases to which its provisions apply, is to so modify the rules of evidence as to make the proof of such defect *prima facie* evidence of negligence on the part of the corporation, yet this statute neither changes nor affects the rule as to the quantum or degree of evidence sufficient or necessary to rebut and control the *prima facie* case thus raised. The general rule would seem to be well established by an almost unbroken line of authority, that to rebut and destroy a mere *prima facie* case, the party upon whom rests the burden of repelling its effect, need only to produce such amount or degree of proof as will counter-avail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose counter-balance the evidence by which the *prima facie* case is made out and established. It need not overbalance or outweigh it. *Smith v. Sac. Co.*, 11 Wall. 139, 20 L. Ed. 102; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *R. R. Co. v. Brazzil*, 72 Tex. 233, 10 S. W. 403.

"In the present case the cause of action pleaded and relied

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upon by plaintiff is grounded solely upon the alleged negligence of the defendant railway company. The general denial in the answer of the railway company puts in issue every allegation of fact in the petition necessary to establish in the plaintiff a right to recover, and the allegation of negligence being the allegation of a material and affirmative fact, the burden, at all times, was upon the plaintiff to establish such fact by a preponderance of the evidence. During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is, that there is a necessity of evidence to answer the *prima facie* case or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial. *Heineman v. Heard*, 62 N. Y. 448. Whether in the case at bar the defendant railway company was guilty of such negligence as would create a liability against it, depended upon the whole of the evidence, as well that which by force of the statute constituted a *prima facie* case against the defendant, as all the other evidence produced by plaintiff tending to corroborate and, by the railway company, tending to rebut the charge of negligence made against it; and if upon the whole case defendant's negligence was not established by a preponderance of the evidence, or if upon all the evidence adduced upon that issue the case was left in equipoise, the defendant was entitled to a verdict, and the jury should have been so charged. Instead, the jury was instructed by the trial judge that to overcome the presumption or inference of negligence raised against it by the statute, the defendant company 'was required to satisfy you by a preponderance of the evidence that it is not negligent.' This, we think for the reasons above stated, was clearly misleading and erroneous."

Under this opinion, as well as that in the *Kreager Case*, it is obvious that negligence is just as much the ground upon which the liability of a railway company rests under the provisions of the fire statutes as it would be if there was no such statute. The statute only provides that proof of the fact that fire was caused by escaping sparks shall constitute *prima facie* evidence of negligence. This, as we have already shown, was the conclusion of many courts as to the effect of such evidence independently of any statute. This is also what the statute does in respect to an injury to an employee resulting from a defect in car, engine, or appliance of a railway company. If a passenger had shown an injury through defective appliance, negligence would be presumed. At the common law this was not the case as to an employee. The latter must go on and affirmatively show that the defect was due to negligence and this he would commonly do by evidence that it was known or should have been known to the master, who had neglected the duty of repair. But the statute

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construed in the Klunk Case provides that proof by the fact of an injury from a defect "shall be *prima facie* evidence of negligence on the part of such corporation." Whether the action be by an employee for an injury due to a defective engine, or by the owner of property destroyed by fire communicated by sparks from an engine, the statute in substance says:

"That in the one action the fact of an injury by a defect in the engine shall be *prima facie* evidence of negligence and in the other the fact that the fire was started by escaping sparks from an engine shall likewise be *prima facie* evidence of negligence."

In both cases the statute effects a mere matter of evidence and in both instances the burden of proving negligence is upon the plaintiff, it shifting only when he has proven one fact from which the other fact, negligence, is inferred and *prima facie* made out until rebutted or countervailed by evidence of due care. Upon principle we can see no room for distinction between the statute interpreted in the Kreager Case and that under consideration in the Klunk Case in so far as that under each proof of one fact is made to constitute *prima facie* evidence of another.

In the Kreager Case the question of what would counterbalance the *prima facie* evidence of negligence was not involved. That the burden is shifted by the statute to the defendant is true, but, as stated in the Klunk Case:

"To rebut or destroy a mere *prima facie* case, the party upon whom the burden rests of repelling its effect, need only to produce such amount or degree of proof as will countervail the presumption therefrom. In other words, it is sufficient if the evidence offered for that purpose counter-balance the evidence by which the *prima facie* case is made out and established. It need not overbalance or outweigh it."

There is, we think, no conflict between the Kreager and Klunk Cases. The latter is the later decision and we can but regard it as an authoritative construction of one Ohio statute which, in respect to the point construed, is identical with the Ohio statute here involved.

If it was error to charge that the *prima facie* evidence of negligence arising from proof of one fact under the one statute could be overcome only by a preponderance of the evidence bearing upon the question of negligence, it was error to charge that such a preponderance was necessary in the case at bar. This the trial judge did and an exception was sufficiently reserved.

For this error the judgment must be reversed, and a new trial awarded.

MURPHY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, May 2, 1907.)

[57 S. E. Rep. 664.]

Carriers—Loss of Freight—Damages.*—Where a carrier takes goods to their destination, notifies consignee of their arrival, and places them in a warehouse, and without any negligence on its part they are destroyed by fire after there has been sufficient time for the consignee to remove them, the carrier is not liable for their loss.

Appeal from Common Pleas Circuit Court of Bamberg County; Watts, Judge.

Action by J. H. Murphy against the Southern Railway Company. From a judgment of the circuit court affirming a judgment of the magistrate, defendant appeals. Reversed.

B. L. Abney and Francis F. Carroll, for appellant.
Eugene T. LaFitte, for appellee.

JONES, J. The plaintiff recovered judgment against defendant in a magistrate court for \$32.50, the value of certain personal property destroyed by fire while in defendant's warehouse at Bamberg, S. C., which was burned October 13, 1905, and in addition plaintiff recovered \$50 statutory penalty for failing to pay plaintiff's claim within 40 days from time of filing. On appeal his honor, Judge R. C. Watts, affirmed the judgment, announcing that he could not hear the evidence taken before magistrate as, in his opinion, the undisputed facts as recited in the notice of appeal and exceptions made out a case of liability on the part of defendant and warranted the judgment of the magistrate. The defendant excepts to this as error.

The facts as set out in the notice and exceptions are as follows: "That the property embraced in said action was shipped over defendant's railroad to Bamberg, S. C., and reached its place of destination in due time, and was unloaded from the defendant's cars and stored in the defendant's warehouse, the usual place of storing such property, on the morning of the 6th day of October, 1905, and there remained continuously, subject to the acceptance and removal of the plaintiff, until said property was accidentally destroyed by fire, along the defendant's warehouse, on the evening of the 13th day of October, 1905, and that the plaintiff, although having due notice and full knowledge that said property

*For the authorities in this series on the subject of the duties and liabilities of carriers as warehousemen, see foot-notes appended to *Kicht v. Wrightsville & T. R. Co.* (Ga.), 23 R. R. R. 605, 46 Am. & Eng. R. Cas., N. S., 605; foot-note appended to *Campbell v. Missouri Pac. Ry. Co.* (Neb.), 23 R. R. R. 554, 46 Am. & Eng. R. Cas., N. S., 554; *Brunson & Boatwright v. Atlantic Coast Line R. Co.* (S. Car.), 23 R. R. R. 19, 46 Am. & Eng. R. Cas., N. S., 19.

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had reached its place of destination and was there awaiting his acceptance and removal, and having more than ample and reasonable time within which to accept and remove the same from defendant's warehouse, nevertheless failed to remove said property from the defendant's warehouse, or to offer to do so, and that at the time the said property was destroyed by fire defendant's duties as a common carrier and insurer of the said property had ceased, and defendant was using due care and diligence to protect said property, and said property was not destroyed through any fault or negligence on the part of the defendant."

The authorities in this state establish that the liability of a railroad company as carrier ceases when the goods are ready for delivery at the place of destination, and the consignee has had a reasonable time within which to remove the goods, after which the company's liability as a warehouseman begins, and that as warehouseman it is liable only for loss resulting from negligence. *Spears & Colton v. Railroad*, 11 S. C. 158; *Bristow v. Railroad*, 72 S. C. 43, 51 S. E. 529; *Brunson & Boatwright v. Railroad*, 76 S. C. 13, 56 S. E. 538; *Fleischman, Morris & Co. v. Railroad*, 56 S. E. 974, 76 S. C. 237.

Upon the facts stated the defendant's relation to plaintiff was that of warehouseman; and, the goods not having been destroyed through any negligence of defendant, there was no liability.

The judgment of the circuit court is reversed.

ST. LOUIS SOUTHWESTERN RY. CO. *et al.* v. KILBERRY *et al.*

(Supreme Court of Arkansas, May 20, 1907.)

[102 S. W. Rep. 894.]

Carriers—Carriage of Goods—Transportation and Delivery.*—The acceptance by a carrier of goods for transportation, in the absence of an express contract restricting its liability, implies an undertaking on its part to transport them to the place to which they are consigned, wherever that may be, even beyond its own line.

Same—Connecting Carriers—Liability.*—In the absence of a stipu-

*See note, 13 Am. & Eng. R. Cas., N. S., 187, et seq.; *Chesapeake & O. Ry. Co. v. F. W. Stock & Sons (Va.)*, 22 R. R. R. 31, 45 Am. & Eng. R. Cas., N. S., 31; *Southern Ry. Co. Co. v. Waters (Ga.)*, 20 R. R. 480, 43 Am. & Eng. R. Cas., N. S., 480; *Gulf, etc., Ry. Co. v. Jackson & Edwards (Tex.)*, 19 R. R. R. 125, 42 Am. & Eng. R. Cas., N. S., 125; *Southern Ry. Co. v. Vaughn (Miss.)*, 18 R. R. R. 334, 41 Am. & Eng. R. Cas., N. S., 334; *Southern Ry. Co. v. Levy (Ala.)*, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50; *Chicago, etc., Ry. Co. v. Woodward (Ind.)*, 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7; *Meredith v. Seaboard Air Line Ry. (N. Car.)*, 17 R. R. R. 641, 40 Am. & Eng. R. Cas., N. S., 641; *Elgin, etc., Ry. Co. v. Bates Mach. Co. (Ill.)*, 7 R. R. R. 256, 30 Am. & Eng. R. Cas., N. S., 256; *Hartley v. St. Louis, etc., R. Co. (Iowa)*, 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569; *Texas & P. Ry. Co. v. McCarthy (Tex.)*, 3 R. R. R. 655, 26 Am. & Eng. R. Cas., N. S., 655; *Hoffman v. Union Pac. Ry. Co. (Kan.)*, 13 Am. & Eng. R. Cas., N. S., 220; *Fremont, etc., R. Co. v. Waters (Neb.)*, 8 Am. & Eng. R. Cas., N. S., 753.

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lation restricting the liability of a carrier, not only the initial carrier, but also any other carrier on whose line loss or injury to the property occurs, is responsible to the owner therefor.

Same—Carriage of Live Stock—Limitation of Liability—Connecting Carriers.—A railroad company accepted several cars of stock for shipment from St. Louis, to a point on its line. As it had no line out of St. Louis, the stock was carried by another line part of the distance, and while being transported by the connecting line it was injured. The bill of lading provided that, if the destination of the cars should be beyond the line of the contracting carrier's road, it should deliver to a connecting carrier at the end of its line; that the duty and liability of the company, as well as that of each connecting carrier, should cease upon delivery to a connecting carrier; and that each succeeding carrier should only be liable for loss or injury occurring on its own line. Held that, the destination of the cars being not beyond the line of the contracting carrier, the provision as to limitation of liability had no application.

Trial—Instructions—Inherent Qualities of Live Stock.—In an action against a carrier for damages to live stock, an instruction for the plaintiff as to the right of recovery was not erroneous because omitting any mention of the element of inherent vice or natural propensity, where there was no evidence on that point, since that was a matter of defense.

Carriers—Injuries to Live Stock—Evidence—Value.—In an action against a carrier for damages to cattle of fine registered breeds, which the plaintiff had bought in Ohio and shipped to South Dakota, and thence to Arkansas, evidence of the market value in Ohio, South Dakota, and West Virginia was competent, in the absence of evidence of a nearer market for cattle of that class.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by M. C. Kilberry and others against the St. Louis Southwestern Railway Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

S. H. West, Bridges, Wooldridge & Gantt, Tom M. Mehaffy, and J. E. Williams, for appellants.

Taylor & Jones, W. N. Carpenter, and H. A. Parker, for appellees.

McCULLOCH, J. The plaintiffs instituted this action against the St. Louis Southwestern Railway Company and the St. Louis Iron Mountain & Southern Railway Company to recover damages for injuries to a lot of horses and cattle. The cars containing the stock were shipped from St. Louis, Mo., under a bill of lading issued by the first-named company, commonly called the "Cotton Belt" road, to De Witt, Ark., a station on the line of that road. The Cotton Belt had no railroad out of St. Louis at that time, and the cars of stock were transported by the other company over its line from St. Louis to Delta, Mo., and thence

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by the Cotton Belt over its own line to De Witt, the destination. The injury to the stock occurred while being transported by the Iron Mountain from St. Louis to Delta, and there is no evidence tending to show that it occurred while on the line of the Cotton Belt road.

The bill of lading contained the following clause: "Second. It is mutually agreed that, if the destination of the aforesaid cars be on the line of St. Louis Southwestern Railway Company, then the St. Louis Southwestern agrees to deliver same to consignee after payment of the charges and surrender of this contract; but, if the destination of such cars be beyond the line of the St. Louis Southwestern Railway Company, then the St. Louis Southwestern Railway Company agrees, and it and each connecting carrier in turn is hereby authorized, to deliver said cars to its connecting carrier for transportation, under the terms, stipulations, limitations, and agreements herein contained, and each and every carrier receiving said cars for transportation shall be deemed to adopt the terms and conditions hereof, and assume the like liability, and shall be entitled to all the provisions, exemptions from and limitations of liability, and other stipulations governing the measure and adjustment of damages herein contained; it being understood and agreed that the duty and liability of the St. Louis Southwestern Railway Company, and that of every other carrier transporting said cars hereunder, absolutely ceases and terminates upon delivery by it of said cars to its connecting carrier. The St. Louis Southwestern Railway Company, in fixing and guarantying through rates to a point beyond its own line, acts only as agent for connecting line or lines, and in no case and under no circumstances shall the St. Louis Southwestern Railway Company be held liable for any injury to or loss of the stock transported hereunder, from any cause whatsoever, happening or accruing beyond its own line, and, in the event of injury to or loss of said stock, only the carrier on whose line the injury or loss actually occurs shall be liable." The circuit court held that as De Witt, the destination of the stock, was on the line of the Cotton Belt, the clause just quoted from the bill of lading did not exempt that company from liability for injury to the property which occurred on the other line, and instructed the jury that "by the terms of said contract, if De Witt, Ark., was a station upon the line of the Cotton Belt Railway, then said railway became and was an insurer of the safe transportation of the plaintiff's property therein mentioned from St. Louis to De Witt, without regard to what lines of railway it might be necessary to use in effecting such transportation."

This court, following the English rule first laid down in *Muschamp v. Lancaster & Preston Junction Railway*, 8 M. & W. 421, has held that the acceptance by a carrier of goods for transportation, in the absence of an express contract restricting its liability, implies an undertaking on its part to transport them to the place to which they are consigned or directed, wherever that

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may be, even beyond its own line, and that such carrier is responsible for loss or injury occurring on the line of a connecting carrier. *K. C., Ft. S. & M. R. Co. v. Washington*, 74 Ark. 9, 85 S. W. 406, 69 L. R. A. 65, 109 Am. St. Rep. 61. This view is not in accord with the weight of American authority, but we adopted it as the more reasonable one of the two lines of decisions on the subject. In the absence of a stipulation restricting liability, not only the initial carrier, but also any other carrier on whose line loss or injury to the property occurs, is responsible to the owner therefor. 1 *Hutchinson on Carriers*, § 236. Now, the question in the case is whether the contract expressly exempts the Cotton Belt road, the company which issued the bill of lading or contract of affreightment, from liability on account of injury to stock while on the Iron Mountain road. The contract starts out with the recital that "the first party [the railway company] will transport for the second party the live stock described below, and the parties in charge thereof, as hereinafter provided, viz.: On cars said to contain [mentioning the property] from St. Louis station to De Witt, Arkansas, station, consigned to F. R. Kilberry." This is clearly an undertaking on the part of the carrier to transport the property to the destination named in the contract, subject only to such express restrictions as are found in subsequent portions of the contract. The second clause of the contract, which has already been quoted, does not, under the circumstances of this case, restrict the liability in this respect. On the contrary, that clause expressly provides that, "if the destination of the aforesaid cars be on the line of the St. Louis Southwestern Railway Company, then the St. Louis Southwestern Railway Company agrees to deliver same to consignee." That clause further provided that, if the destination of the cars should be beyond the line of that company's road, it should deliver to a connecting carrier at the end of its line; that the duty and liability of that company, as well as that of each connecting carrier, should cease upon delivery to a connecting carrier; and that each succeeding carrier should only be liable for loss or injury occurring on its own line. But the destination of this consignment was not beyond the line of the contracting carrier. It was on that line, and the clause quoted has no application to this shipment.

The language employed in the contract is that of the carrier, and must be construed most strongly against itself; all doubt as to the meaning of terms being resolved in favor of the shipper. This form of contract was doubtless one in general use; but this particular clause had no application, because this shipment did not fall within its terms. It was obviously a misfit, so far as this consignment is concerned. We think the trial court correctly construed the contract, and properly instructed the jury with reference to it. The trial resulted in a verdict in favor of the plaintiff against each of two defendant railway companies, and both appealed. The evidence is sufficient to sustain a finding against each company, and the question of liability of each

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was submitted upon correct instructions. So the verdict will not be disturbed.

The giving of the following instruction is assigned as error: "(5) The burden is on the plaintiffs to show by a preponderance of the evidence the fact that their horses and cattle were injured, the nature and extent of such injuries, and that they were damaged thereby. After these facts are shown by such preponderance of evidence, it would then be the duty of the jury to award to the plaintiffs such a sum as would compensate them for the damages so by them sustained; the amount of such damages or compensation to be ascertained and fixed according to instructions hereinafter given." The court also gave the following instruction concerning the liability of the Iron Mountain Company: "(9) Unless you believe from the evidence that the stock in controversy passed over the road of the St. Louis, Iron Mountain & Southern Railway Company, and were in charge of said road at the time of the injuries complained of in De Soto, your verdict should be for said defendant; and, in passing upon the question as to whether or not the injury happened upon said defendant's road, you are not at liberty to presume that the road or yards at De Soto belonged to the said defendant, but such fact must appear from the evidence."

It is contended that the fifth instruction was erroneous, because it permitted the jury to find for the plaintiffs, even though the injury to the stock might have resulted from inherent vices or natural propensities of the animals. It seems to be settled that a somewhat different rule prevails with reference to the liability of carriers between shipments of goods, inanimate things, and shipments of live stock. "The liability of carriers of animals, it is said, is essentially different from that of the carrier of merchandise or of inanimate property. While common carriers are insurers of inanimate goods against all loss and damage, except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities and which could not be prevented by foresight, diligence, and care." 1 Hutchinson on Car. § 343. It was not intended to ignore or change this rule in the recent case of St. L. & S. F. R. Co. v. Wells (Ark.) 99 S. W. 534. There was no evidence in that case that the killing of the animal while in transit was caused by any inherent vice or natural propensity of the stock being transported, and that was not a feature of the case. The instruction complained of here omitted any mention of such a state of facts, and it was unnecessary to do, as the burden of proof was not upon the plaintiff to negative the fact that the injury to the stock resulted from inherent vices or natural propensities of the animals. That was matter of defense, to be established by the carrier, as it was the insurer of the safety of the consignment, except as against injuries resulting from such vices and propensities, or from acts of God or the public enemy. *Railway v. Wells, supra.*

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Appellant contends that the court erred in permitting the plaintiff to prove the market value in Ohio, South Dakota, and West Virginia of cattle of the kind owned by plaintiff which were injured. The cattle were of fine registered breeds, which plaintiff had bought in Ohio and shipped to South Dakota, and thence to Arkansas. There was proof tending to show that there was no market in Arkansas county for such cattle, and witnesses were allowed to testify, over the objection of the defendants, as to the market value in the states named. There was no evidence introduced by either party of a nearer market for such cattle, except that the defendant introduced some proof tending to show that there was a market value in Arkansas county, which was disputed. The court in *Jones v. Railway*, 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175, said: "To establish value, as to establish other facts, the law requires the best evidence that can be had. In most cases this rule would require proof of value in the market at the time and place of the injury; for, if the property was held for sale, this shows the extent of the loss in not being able to sell it, and, if it was held for use, this shows what it would cost to replace it. But, while the principle which exacts the best evidence is general, what constitutes the best evidence varies with the circumstances of the different cases." We think the testimony was, under the circumstances, competent for the jury to consider, in the absence of other evidence of the market value. *Jones v. Railway*, *supra*; *Railway Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901.

The case was fairly submitted to the jury upon competent evidence, which was sufficient to support the verdict, and upon correct instructions; and we find nothing sufficient to justify us in disturbing the verdict.

Affirmed.

LOUISVILLE & N. R. Co. v. COMMONWEALTH.

(Court of Appeals of Kentucky, June 20, 1907.)

[103 S. W. Rep. 349.]

Intoxicating Liquors—Sales—Persons Liable.—Under Ky. St. 1903, § 2572, providing that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc., a railroad company cannot be fined for permitting an express company, having its office in the railroad company's building, to deliver whisky and collect money for it, where the express company was authorized by law so to do.

Same—Prosecutions—Evidence.—Ky. St. 1903, § 2572, provides that the person in possession of premises on which liquor is sold in violation of law shall be subject to fine, etc. Held, that proof that an express company having an office in the building owned by defendant railroad company delivered whisky which had not been ordered

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and collected money for it, in a county where the local option law was in force, while showing a sale there of the whisky, was not conclusive, defendant being entitled to show that the transaction was one of interstate commerce, conducted according to the usual course of business, and that the express company in delivering the whisky and collecting the money for it acted in good faith, without knowing or having reasonable grounds to believe that the package it delivered contained whisky or had not been ordered, in which event defendant would not be guilty.

Same—Good Faith.—Ky. St. 1903, § 2572, provides that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc. Held, in a prosecution against a railroad company for permitting an express company having an office in defendant's building to sell liquor in violation of law, the commonwealth should not be confined on the question of the good faith of the express company in acting in ignorance of the fact that the package delivered by it contained whiskey, etc., to proof of the one transaction named in the indictment, but, should be allowed to show the manner in which the business of the office was conducted, and such other facts as are competent under the rules of evidence, where the question of intent or good faith is involved.

Courts—Previous Decisions by United States Supreme Court—Effect in State Court—Interstate Commerce—Intoxicating Liquors.—In a prosecution under Ky. St. 1903, § 2572, providing that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc., where an interstate shipment is involved, the rules laid down by the United States Supreme Court must control.

Appeal from Circuit Court, Laurel County.

"To be officially reported."

The Louisville & Nashville Railroad Company was convicted for violating Ky. St. 1903, § 2572, relating to sale of intoxicating liquors, and appeals. Reversed and remanded.

J. W. Alcorn, T. B. Harrison, Jr., and Benjamin D. Warfield, for appellant.

N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

HOBSON, J. . Section 2572, Ky. St. 1903, is in these words: "The person in possession of the premises on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law, by any trick or method whatever, on conviction, shall be fined not less than twenty nor more than one hundred dollars for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished, or disposed of." The Louisville & Nashville Railroad Company was indicted under this statute. The charge in the indictment is that it unlawfully, willfully, and knowingly suffered and permitted

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the Adams Express Company and its agent, Bill Sams, to sell to Robert Ridings from its depot and office in Pittsburg, in Laurel county, spirituous and malt liquors in quantities of less than five gallons, in violation of the local option law, on premises in its possession and under its occupancy and control. The defendant pleaded not guilty. A trial was had resulting in a judgment against the defendant for a fine of \$100, and it appeals.

The facts shown on the trial are as follows: William Sams was the agent of the railroad company and also of the express company at Pittsburg, in Laurel county. He delivered to Robert Ridings a box containing fourt quarts of whisky, for which he received \$3.80. Ridings had not ordered this whisky. He got it from William Sams the agent. His testimony is as follows: "Q. What amount of money did you pay him? A. Three dollars and eighty cents. Q. How did you happen to know the whisky was there? A. Why, the boxes would just come there in my name, and I would go and get them and pay for them. Q. Did you order this box of whisky that you speak of? A. No, sir. Q. Did you know that it was going to be shipped there to you? A. No, sir; just when one would come in my name I would go and get it and pay for it." On cross-examination he testified as follows: "Q. Do you know how the party who shipped this whisky to you—do you know how he happened to find out there was such a fellow as you? A. I heard there was fellows going through there and getting names of fellows, and shipping whisky to them. Q. Did you ever find a package there that you did not take out? A. He might have sent some back. Q. How was this put up, Mr. Ridings? A. In a square box. I believe it said 'Glass' on the box. Q. Is that all it said? A. I don't remember anything else. Q. Your name was on it? A. Yes, sir; my name was on it. Q. And your address—'Pittsburg, Kentucky'? A. Yes, sir; I suppose it was. Q. And 'Glass'; and that is all that was on it? A. Yes, sir. Q. Where was it from? A. I don't believe it said on the outside of the box. Q. I am asking where it came from—not what it said? A. On the bottles of whisky it said something about Cincinnati, Ohio. Q. Do you remember the name of the distillery? A. White Oak Distillery Company. Q. First district of Ohio? A. I don't remember about that. Q. Did you ever get any packages out of the depot or express office in Pittsburg that did not contain whisky? A. No, sir; I don't know that I ever did." Sams was put on as a witness for the defense, and testified as follows: "Q. Had you any belief or information as to what the contents were? (Defendant objects. Objection overruled. Defendant excepts.) A. I never gave it any thought. Q. I want to know, Mr. Sams, if you had any belief or information as to what the box contained? (Objection overruled. Defendant excepts.) Q. Of course, I know you didn't know, because you didn't see in the box; but I want to know if you had any information or belief as to what it contained? A. No, sir; I didn't know. Q. Now, Mr. Sams, I didn't ask you what you knew. I asked if

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you had any knowledge or information about it. (Defendant objects. Objection overruled. Defendant excepts.) A. I don't know as I did. I never formed any opinion about it. Q. Mr. Sams, how many such boxes as those were handled in the depot at Pittsburg in the 12 months next before the 13th day of July, 1906? About how many? (Defendant objects. Objection overruled. Defendant excepts.) A. I don't know. Q. About how many? A. I don't know. I don't have any idea. We handled several boxes. Q. And didn't you handle several hundred boxes? A. No, sir. Q. How much would be a safe estimate, Mr. Sams? A. I don't know. Q. How do you know there were not several hundred, then? A. Because I know there were not. We handled several boxes, but not several hundred. Q. Do you think there were as many as a hundred? A. Yes, sir. Q. Any more? A. I don't know but what there was. Q. How many would you have in the depot any one time? A. Six or eight, and sometimes not any. Q. How regular would they come there? A. I suppose whenever a man would order them. Q. I suppose that, too; but I want to know how many were kept there regularly in the depot? A. I don't just understand you. Q. How many boxes were kept in the depot regularly? A. I don't know. Q. How often would they come in the year? A. Sometimes every day or every other day. Q. Do you remember any week in the entire year that you didn't get more or less? A. No, sir. Q. You knew you were sending the money back to a whisky house in Cincinnati? A. Yes, sir."

Pittsburg in Laurel county is a mining town of several hundred inhabitants, and, while the proof in the case is not as full as in the case of *Adams Express Company v. Commonwealth*, 92 S. W. 932, 5 L. R. A. (N. S.) 630, 29 Ky. Law Rep. 224, the proof indicates much the same manner of doing business. In *Adams Express Company v. Commonwealth*, 87 S. W. 1111, 27 Ky. Law Rep. 1096, it was held by this court that whisky was sold where it was delivered and paid for, though it was shipped C. O. D., if there was no order for the whisky and the consignor shipped the whisky to the consignee without his knowledge. But on appeal to the United States Supreme Court of that case it was held there that the indictment was not a charge of selling the whisky, and that the proof that it was sold by the express company to the consignee was immaterial. The court said: "With reference to the testimony as to the knowledge by the company of the fact that the whisky had not been ordered by the consignee, it is sufficient to say that the averment in the indictment is that the express company was engaged in the business of a common carrier of packages, etc., and that the shipment and delivery were made and done in the usual course of its business. This excludes necessarily the assumption that the transaction was one of sale by the express company at East Bernstadt, and, of course, the company was under no obligation to offer testimony in support of that which

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the state admitted to be the fact. We do not mean to intimate that an express company may not also be engaged in selling liquor in a state contrary to its laws, or that the fact that the consignee did not order a shipment, might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order by the consignee may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question. Much as we sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce." The form of the indictment in the case before us is not such as to make it possible to give it the construction given the indictment in that case. The charge here against the railroad company is that it knowingly suffered the whisky to be sold on its premises. The whisky in contest was sold somewhere. If it was sold on the defendant's premises with its knowledge and consent, it is ordinarily immaterial where it came from, or how it got to the defendant's premises. If a man living in Louisville should take his whisky in his hand, and sell it from the station at Pittsburg with the knowledge and consent of the defendant, it would be liable. It is to the same extent liable if, instead of bringing it there by his own hand, he sent it there, and sold it there by the hand of his agent, the express company. The effect is the same where the whisky comes from a point without the state as where it comes from a point within the state. If this would have been a sale of the whisky at Pittsburg if the whisky had been shipped from Louisville, it is a sale of the whisky at Pittsburg when it was shipped from Cincinnati. Sams, who sold the whisky to Ridings and received the money, was the agent of the railroad company, and as such had possession of the building. He was the representative of the railroad company for that purpose. Notice to him was therefore notice to the company.

But the railroad company cannot be fined under the statute for suffering the express company to do what the law authorized it to do. If the express company was authorized by law to deliver the whisky and collect the money for it, then section 2572, Ky. St. 1903, cannot be applied to the transaction. When the state showed that the whisky had not been ordered, and that the express company delivered the whisky and collected the money

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for it in Laurel county where the local option law is in force, it showed a sale there of the whisky. But this showing, as held by the United States Supreme Court, is not conclusive. The defendant may show that the transaction was one of interstate commerce conducted according to the usual course of business, and that the express company in delivering the whisky and collecting the money for it acted in good faith, without knowing or having reasonable grounds to believe that the package it delivered was whisky or had not been ordered, in which event the jury should find the defendant not guilty. Reasonable grounds to believe a fact is such grounds as will induce a person of ordinary prudence under like circumstances to so believe. In Bishop on Statutory Crimes, § 132, the rule is thus stated: "One who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what under the real facts is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law, and in construction it restricts the statute." Again, in section 1022, it is said: "Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege or the government's evidence show that he knew the fact. His being misled concerning it is matter for him to set up in defense and prove." These statements of the law are supported by a number of authorities. An illustrative case is *Myers v. State*, 1 Conn. 502. There was a statute in force punishing the letting of a carriage for the conveyance of persons on Sunday, except for necessity or charity. The defendant was told by the person to whom he hired the carriage that it was needful for charity, and, acting honestly under this impression, let him have the carriage. A conviction was reversed, the court holding that the jury should have been instructed that if the defendant had reasonable grounds to believe from the representations made to him that a case of charity existed, and that if he acted honestly under the impression of that belief, they should find him not guilty. The same principle has been applied in a number of similar cases where the defendant acted honestly, in the regular course of business, under a mistake of fact. But in this class of cases as the statute makes the sale of the whisky in a local option district an offense, when the state shows a sale, it has made out its case, and it is then incumbent upon the defendant to show that it acted in the usual course of business honestly and under a mistake of fact. The defendant must not shut its eyes, but must use ordinary circumspection, and, if the facts before it are sufficient to apprise a person of ordinary prudence of the truth, it cannot escape liability. On the question of the good faith of the express company the commonwealth should not be confined in the proof to the one transaction named in the indictment, but should be allowed to show the manner in which the business of the office was conducted,

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and such other facts as are competent under the rules of evidence where the question of intent or good faith is involved.

The instructions of the court were not in accord with the principles laid down by the United States Supreme Court, and, as this was an interstate shipment, the rules announced by that court must control.

Judgment reversed, and cause remanded for a new trial.

GEORGE D. SHORE & BRO. v. BALTIMORE & O. R. CO.

(Supreme Court of South Carolina, March 28, 1907.)

[57 S. E. Rep. 526.]

Commerce—Interstate Commerce—What Constitutes.*—Where a car owned by a foreign railroad, and loaded with interstate freight, to be unloaded at its destination within the state, and again loaded with interstate freight and returned in course of interstate commerce, arrives in the state, it cannot be attached at its destination before being unloaded, in a suit by a resident against the foreign railroad company, it being engaged in interstate commerce.

Attachment—Intervention.—Where a car owned by a foreign railroad company, loaded with interstate freight, is shipped into the state and attached before it is unloaded, the railroad company in the state, in whose possession the car is, can intervene, under Civ. Code 1902, § 255a, providing for such intervention by the person in whose possession the property is attached.

Appeal from Common Pleas Circuit Court of Sumter County; Purdy, Judge.

Action by George D. Shore & Bro. against the Baltimore & Ohio Railroad Company. From an order dissolving attachment on the motion of the Atlantic Coast Line Railroad Company, plaintiffs appeal. Affirmed.

Lee & Moise, for appellants.

Willcox & Willcox, *Mark Reynolds*, and *Henry E. Davis*, for respondent.

JONES, J. The plaintiff brought this action to recover of the Baltimore & Ohio Railroad company damages for failure to promptly deliver a shipment of corn, and procured a warrant of attachment against defendant as a foreign corporation alleged to have property in this state. After giving the notice required by section 2178, vol. 1, Civil Code 1902, the sheriff, under this war-

*For the authorities in this series on the question whether a carrier was engaged in interstate commerce on a particular occasion, see foot-note appended to *Porter v. St. Louis S. W. Ry. Co. (Ark.)*, 21 R. R. R., 296, 44 Am. & Eng. R. Cas., N. S., 296.

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rant of attachment, seized a freight box car, No. 81,610, belonging to the Baltimore & Ohio Railroad Company, while in the possession of the Atlantic Coast Line Railroad company, and standing on its track at Sumter, S. C., loaded with hay, which hay had been consigned to plaintiff and transported in said car from Galata, Ill., to Sumter, S. C., by connecting carriers, the Atlantic Coast Line Railroad Company having received the same from the Georgia Railroad at Augusta, Ga. After publication of the summons and personal service on the defendant at its principal office in Baltimore, Md., judgment by default of answer or appearance was entered for the amount of the claim. The Atlantic Coast Line Railroad Company, however, intervening under section 255a, Code Civ. Proc. 1902, appeared at the return of the writ and filed an answer, claiming the right to the possession and use of the car as a bailee for hire under an agreement with the Baltimore & Ohio Railroad Company, known as the "Per Diem Agreement of the American Railway Association," the terms of which were set forth in the answer, and further alleged upon the facts stated that the car when attached was engaged in, and was an instrumentality of, interstate commerce, and was not liable to be seized under said attachment. The plaintiffs demurred to the answer on the ground that the facts stated do not entitle the intervener to any relief under section 255a, and upon this the issue was framed. Judge Purdy, before whom the issue was tried, held, in effect, (1) that the Atlantic Coast Line Railroad Company had the right to intervene under section 255a; (2) That the Baltimore & Ohio Railroad Company could not have taken the car from the possession of the Atlantic Coast Line Railroad Company until it was unloaded and after the expiration of the time under the agreement to exercise the right to retain the car loaded, and the attaching creditor could have no higher right to do so; (3) that the statute regulating attachment of railroad cars in use cannot be so construed as to authorize attachment of a car of a foreign corporation while in use in this state as an instrumentality of interstate commerce, and accordingly he adjudged that the Atlantic Coast Line Railroad Company was entitled to the possession of the car in question, with costs. The plaintiff's exceptions in various forms challenge the correctness of these conclusions.

The first question is then as to the right of the Atlantic Coast Line Railroad Company to intervene under section 255a. That section provides: "If the person in whose possession such property shall be attached shall appear at the return of the writ and file his answer thereto, and deny the possession or control of any property belonging to the defendant, or claim the money, lands, goods and chattels, debts and books of account as creditor in possession, or in his own right, or in the right of some third person, or if any part of the said property be claimed by any other person than such defendant, then, if the plaintiff be satisfied therewith, the party in possession shall be dismissed, and the plaintiff

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pay the costs of his action. But if the plaintiff shall contest the said return, or the claim of said third person, an issue shall be made up under the direction of the judge to try the question, and the party that shall prevail in said issue shall recover the costs of such proceeding of the opposite party, and judgment shall be given accordingly. * * * As held by the circuit judge, the Atlantic Coast Line Railroad Company, in whose possession the property was attached, claimed the right to the possession of the property by virtue of the agreement with the Baltimore & Ohio Railroad Company. The object of the statute was not merely to allow an intervention by one in possession of the property claiming absolute ownership in his own right, but also by one in possession claiming a right to such possession, a special property interest affected by the attachment. The statute "provides a mode by which such third persons may retain or regain possession of the property." *Ford v. Calhoun*, 53 S. C. 106, 30 S. E. 830. This is not a case in which a party in possession of the property seeks to set aside an attachment for irregularities, but is a case in which the party in possession claims that he cannot be deprived of such possession under attachment proceedings because of the protection of the interstate commerce law.

The real question, therefore, is whether interstate commerce law protects the property from attachment in the hands of defendant. We agree with the circuit court that it does. This question was attempted to be raised in *Chitty v. Railway Co.*, 62 S. C. 532, 40 S. E. 944, but the court did not pass on it, as the record did not contain the facts upon which it could be based. This section, however, cannot be given a construction which would authorize attachment of property within the protection of a paramount law, such as interstate commerce. The facts of the case show, not only that the car attached was the car of a foreign corporation in the possession of the Atlantic Coast Line Railroad Company, as bailee for hire, but was an instrumentality of interstate commerce and actually in use as such when attached, being loaded with interstate freight not delivered to the consignee. In the cases of *Wall v. Norfolk & Western Ry. Co.*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948, and *Connerly v. Quincy, etc.*, R. R. Co., 99 N. W. 365, 92 Minn. 20, 64 L. R. A. 624, 104 Am. St. Rep. 659, the question raised here was fully considered, and the conclusion reached that by reason of the commerce clause of the federal Constitution and the interstate commerce act of Congress a railroad car sent loaded from one state into another and to be returned loaded to the former state in the transaction of interstate commerce cannot be attached in the latter state. The reasons upon which these cases rest are so fully and clearly stated therein and so meet our approval that we content ourselves with a reference to them.

The judgment of the circuit court is affirmed.

TILLER & SMITH *v.* CHICAGO, B. & Q. RY. CO.

(Supreme Court of Iowa, July 3, 1907.)

[112 N. W. Rep. 631.]

Carriers—Carriage of Live Stock—Delay in Transportation—Actions—Burden of Proof.*—In an action against a carrier for delay in shipment of cattle, the burden of proof was upon the carrier to show an excuse for the delay.

Same—Injury to Stock—Defenses—Damages.—It was no defense to an action against a carrier for delay in shipment of cattle that the shipper did not sell the cattle upon the first available market after arrival at their destination, where the evidence showed that a sale upon that market would have resulted in a greater loss than was suffered through their sale upon another market.

Appeal—Harmless Error—Instructions.—Where, in an action against a carrier for delay in shipping live stock, the shipper only claimed damages for delay in shipping to their destination, but on cross-examination the fact was developed that the stock was reshipped and sold upon another market, and on redirect examination the transaction was fully shown, an instruction, limiting the plaintiff's recovery to the net loss incurred in the whole transaction, was not prejudicial to the carrier, where the evidence showed that this was considerably less than the shipper would have been entitled to if the stock had not been reshipped.

Appeal from District Court, Fremont County; N. W. Macy, Judge.

Suit to recover damages occasioned by delay in shipping live stock. There was a judgment for the plaintiff, and the defendant appeals. Affirmed.

H. J. Nelson and *T. S. Stevens*, for appellant.

R. C. Campbell, for appellees.

PER CURIAM. On the 1st day of February, 1905, the plaintiff delivered to the defendant at Riverton, Iowa, for shipment to St. Joseph, Mo., two car loads of cattle, which he alleges would have reached St. Joseph, Mo., on the morning of the 2d of February but for the negligence of the defendant, and that by reason thereof they did not in fact reach St. Joseph until in the evening of the 2d of February, too late for the market of that day. The plaintiff alleges that, if the cattle had reached St. Joseph on the morning of the 2d of February, they could have been sold for \$5.05 per hundred-weight, but on the market of

*See foot-notes appended to *Peterson v. Chicago, etc., Ry. Co.* (S. Dak.), 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48; foot-note appended to *Lehman, Stern & Co. v. Morgan's, etc., Co.* (La.), 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

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the 3d of February, and subsequent thereto, until they were shipped to Chicago, they could not have been sold for more than \$4.70 per hundred. He further alleged that there was an unusual shrinkage due to the delay and extra expense for feed on account thereof. The cattle were in fact shipped to Chicago, where they were sold at quite an advance over the St. Joseph market.

The appellant urges that there is no evidence showing negligence on its part. The burden of proof was upon the appellant to show an excuse for the delay in shipping from Hamburg to St. Joseph, which would relieve it from liability, and this it did not do. *McCoy v. K. & D. M. R. Co.*, 44 Iowa, 424.

The appellant further contends that it was the duty of the plaintiff to sell their steers upon the first available market after their arrival at their destination, and, because they did not do so, it is urged that they cannot recover in this action. The rule stated is undoubtedly correct; but the evidence in this case conclusively shows that a sale on the market at St. Joseph at the time indicated would have resulted in a much greater loss to the plaintiff, and in a greater liability on the part of the defendant, than was suffered or incurred by the shipment to Chicago. The appellant is therefore in no situation to complain of the reshipment.

The appellant complains of certain instructions given by the trial court. The plaintiffs, in their pleadings, made no claim for anything except the damages caused by the delay in shipping to St. Joseph; but, on the cross-examination of one of the plaintiffs, the defendant developed the fact that the cattle had been reshipped from St. Joseph to Chicago, and, on the redirect examination, the transaction was fully developed without any objection on the part of the appellant. In the instructions complained of, the court did no more than to limit the plaintiff's recovery to the net loss sustained in the entire transaction. This was considerably less than the plaintiff would have been entitled to had there been no reshipment to Chicago and sale there, and it is evident that the appellant has no just ground for complaint.

There is no error in the record, and the judgment is affirmed. Affirmed.

CLARK *v.* ULSTER & D. R. Co.

(Court of Appeals of New York, June 14, 1907.)

[81 N. E. Rep. 766.]

Carriers—Shipment of Live Stock—Cars—Contract to Furnish.—

Where a carrier undertook, through a station agent, to furnish cars for a shipment of live stock at a specified time and station, the contract was not void nor superseded by a written contract for the transportation of the live stock signed by the shipper subsequent to the breach of the oral contract, in the absence of some consideration in the written contract moving to the shipper as compensation for damages already incurred by him.

Same—Validity—Mutuality.—Where a shipper of live stock applied to a carrier's station agent for cars to be furnished at a specified time and place for the transportation of stock and the agent promised to furnish the cars, there was an implied enforceable engagement on the part of the shipper to furnish stock to ship in the cars, so that the carrier's agreement was not void for want of mutuality.

Same—Station Agents—Authority.*—A carrier's station agent has authority to contract on the carrier's behalf to furnish stock cars to a shipper of live stock at a specified time and place.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by W. Frank Clark against the Ulster & Delaware Railroad Company. From a judgment of the Appellate Division (10 N. Y. S. 1110, 114 App. Div. 908) unanimously affirming a judgment on a verdict in favor of plaintiff, defendant appeals. Affirmed.

Amos Van Etten, for appellant.

C. L. Andrus, for respondent.

WILLARD BARTLETT, J. The plaintiff in this action has recovered a verdict against the defendant for damages sustained by him in consequence of the defendant's breach of a contract, whereby it undertook to furnish a car at certain stations upon its line for the shipment by the plaintiff of a lot of live stock to Kingston and thence by the West Shore Railroad to the city of New York. The judgment entered upon the verdict has been unanimously affirmed by the Appellate Division; and the principal question presented by the defendant's appeal to this court is whether the interviews between the plaintiff and the defendant's station agent at the point of shipment constituted an agree-

*For the authorities in this series on the subject of the implied authority of a railroad's freight or ticket agents, see foot-notes appended to *Gulf*, etc., *Ry. Co. v. Jackson & Edwards* (Tex.), 19 R. R. R. 125, 42 Am. & Eng. R. Cas., N. S., 125; *St. Louis*, etc., *R. Co. v. White* (Tex.), 20 R. R. R. 796, 43 Am. & Eng. R. Cas., N. S., 796.

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ment binding upon both parties for the violation of which the defendant is legally liable. According to the testimony of the plaintiff, he applied on Monday, June 29, 1903, to Fred More, the station agent of the Ulster & Delaware Railroad Company at Hobart, N. Y., to furnish a car at that station and Grand Gorge on the ensuing 7th of July for the transportation of cattle to New York. The plaintiff said: "Fred, I want a car for a week from to-morrow." The agent answered: "All right, you can have one." The purpose for which the plaintiff desired the car was expressly stated as being "to ship a car of cattle." On Wednesday or Thursday succeeding this conversation the plaintiff had a further interview with the station agent, which he narrated as follows: "I told him I wanted to find out whether or not I was going to have that car sure and for him to ask the railroad company if I could have it for sure, and if I could fill out at Grand Gorge, and he asked them. He telegraphed them. He told me he telegraphed, and he said I could have the car and I could fill out down there at Grand Gorge." Acting upon this assurance, the plaintiff had the cattle, swine, and sheep which he proposed to ship brought to the stations indicated and in readiness to be placed upon the car there on Tuesday, July 7, 1903. The defendant, however, failed to furnish the car, and none was provided until the night of Thursday, the 9th. This was too late to permit the arrival of the stock in New York on a market day in that week. The result of the delay was that the animals were not taken on board until July 14, 1903, on which date the plaintiff was required by the station agent to sign a written agreement in reference to the transportation of the animals commonly denominated a "live stock contract." The damages awarded by the jury represent the expense to which the plaintiff was put in caring for the live stock during the week of their detention at the points of shipment and the depreciation in their market value caused by the delay. The complaint was so framed as to charge the defendant, not only upon the express oral contract made through its station agent by means of the interviews already narrated, but also upon the obligation of the railroad corporation as a common carrier. The case went to the jury, however, solely upon the issue of an express contract, and the main points argued here in behalf of the appellant are the propositions, first, that the live stock contract in writing merged all the negotiations involved in the interviews of the previous week; and, secondly, that those interviews cannot be held to amount to a contract, inasmuch as there was a lack of mutuality.

As to the first proposition, it is to be noted that the live stock contract does not relate to the same subject-matter as the interviews. The subject-matter of the conversation with the station agent was the furnishing of a cattle car at certain specified stations at a specified time for the transportation of the plaintiff's live stock. The subject-matter of the live stock contract was the

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extent of the obligations to be assumed by the Ulster & Delaware Railroad Company after the delivery of the animals to that corporation for conveyance to their destination. This is apparent from the very beginning of the live stock contract, which witnesseth that "the said shipper has delivered to the said carrier live stock" of the kind and number and consigned as indicated in the succeeding part of the document. In other words, the live stock contract spoke only in futuro, and was designed simply and solely to limit the liability of the carrier after the business of transportation had begun. It in no wise referred to the furnishing of the car, nor was there any language therein which could properly be held to have waived or otherwise affected any right which had accrued to the plaintiff in reference to that matter. Indeed, whatever right of action the plaintiff had by reason of the defendant's failure to furnish the car at the time promised by its agent was perfect and complete before the live stock contract was presented to him for signature. An oral contract whereby a railway company, undertakes through a station agent to furnish cars for a shipment of live stock at a specified station and at a specified time is not avoided by a written contract signed by the shipper subsequent to a breach of the oral contract, unless there is in such written contract some consideration moving to the shipper as compensation for the damages already incurred by him. *Gulf, Colorado & Santa Fe Ry. Co. v. House & Watkins*, 88 S. W. 1110, Court of Civil Appeals of Texas, June, 1905. No such consideration can be discovered in the live stock contract in the present case. See *Waldron v. Fargo*, 170 N. Y. 130, 137, 62 N. E. 1077.

The other point relied upon by the appellant, to wit, that the alleged oral contract was void for want of mutuality, assumes that the request by the plaintiff to the agent of the defendant to furnish the car, followed by the promise of the agent to comply with such request, imposed no legal obligation upon the plaintiff to furnish any stock for shipment, or to compensate the defendant for its trouble and expense in furnishing the car in case he failed to make use of it. That this is the position of the learned counsel for the appellant is made clear by the following question on his brief: "Let us suppose that after this order for a car was given upon its arrival at Hobart on July 7th the plaintiff had then informed the agent that his stock had been sold and he would not ship, could the defendant then have recovered for a breach of the order as given?" We think there is no doubt that this question must be answered in the affirmative. The request that the car be furnished carried with it, by implication of law, an agreement to make use of it if the request was complied with and a correlative promise to pay to the defendant in the event of nonuser, whatever loss it might thereby incur. This obligation is just as clear as would be that of a person who went into a restaurant and ordered a dinner for a party of friends to pay for the meal furnished in accordance with his order, even

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though he produced no guests to partake of his hospitality. The mere order under such circumstances carried with it the implication of a promise to pay. "Where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply or the jury may infer a promise by each party to do what is to be done by him." Ward's Pollock on Contracts (3d Ed.) pp. 9, 10. In the case at bar the request by the plaintiff, coupled with the assurance by the agent of the defendant that the car would be furnished, created a relation between the parties to the present action which plainly falls within the doctrine thus stated.

That a shipper's order calling for a specific number of cars for a specified day will, when accepted by a common carrier, constitute a contract binding the carrier to furnish the cars and the shipper to furnish the goods wherewith to load the cars, has been expressly decided by the Circuit Court of the United States (Mo. Pac. Ry. Co. v. Tex. & P. Ry. Co. [C. C.] 31 Fed. 864), and by the Appellate Court of Indiana (Pittsburg, etc., Ry. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853). In the case last cited the court said: "If a shipper's order to a common carrier of live stock for a designated number of cars to be furnished at a station indicated, on a day mentioned in the future, for the transportation of such stock, is accepted by the carrier, such agreement would constitute a contract binding on the company to furnish the cars, and upon the shipper to furnish the stock to load them." Indeed, no case is referred to by the learned counsel for the appellant which questions the legal obligation of a railroad company to perform such a promise as that testified to by the plaintiff in the case at bar. The binding character of such an agreement is recognized by the textwriters and by the courts wherever the question appears to have arisen: "Where a railroad company expressly undertakes by special contract to furnish cars at a specified time, it is bound to perform its contract." 4 Elliott on Railroads, § 1473; Gulf, etc., Ry. Co. v. Hume, 6 Tex. Civ. App. 653, 64 S. E. 915; Heading & Stave Co. v. Railroad, 119 Mo. App. 495, 94 S. W. 597; Wood v. Chicago, Milwaukee & St. Paul Ry. Co., 68 Iowa, 491, 27 N. W. 473, 56 Am. Rep. 861; Gulf, Colorado & Santa Fe Ry. Co. v. House & Watkins, *supra*. In some cases the implied authority of a station agent to bind the railroad company by a contract to furnish cars by a certain day has been questioned; but the prevailing doctrine is that such authority will be deemed to be included within the scope of his employment. See Wood v. Chicago, Milwaukee & St. Paul Ry. Co., *supra*, and Easton v. Dudley, 78 Tex. 236, 14 S. W. 583.

The only objections to the evidence offered to establish the amount of damage suffered by the plaintiff were based solely on the erroneous view that the live stock contract was the only

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agreement between the parties, and no exceptions were taken to the judge's charge in reference to the measure of damages.

We think that the judgment was right and should be affirmed, with costs.

GRAY, O'BRIEN, VANN, WERNER, and CHASE, JJ., concur.
CULLEN, C. J., absent.

Judgment affirmed.

DECKER v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Minnesota, July 26, 1907.)

[112 N. W. Rep. 901.]

Carriers—Carriage of Passengers—Railway Mail Clerk—Duty—Question for Jury—Instructions.*—The plaintiff was a railway mail clerk in the service of the United States, and as such had charge of the mails carried in a mail car by the defendant. This is an action to recover damages for personal injuries sustained by the alleged negligence of the defendant in not keeping the door of the car in such condition that it could be closed, whereby he contracted a cold and was made seriously ill. Held:

(1) The plaintiff was a passenger on the mail car, and the defendant owed to him the same duty that it would to a passenger for hire therein.

(2) The questions of the defendant's negligence, and whether it was the cause of the plaintiff's illness, and of his contributory negligence, were made by the evidence questions of fact.

(3) There were no reversible errors committed by the trial court, either in its rulings as to the admission of evidence or in its charge to the jury.

(4) *Getchell v. Hill*, 21 Minn. 464, as to the form and substance of hypothetical questions, followed.

(Syllabus by the Court.)

Appeal from District Court, Faribault County; James H. Quinn, Judge.

*For the authorities in this series on the question whether railway postal clerks are passengers, see *Southern Pac. Co. v. Cavin* (C. C. A.), 20 R. R. R. 803, 43 Am. & Eng. R. Cas., N. S., 803; *Malott v. Central Trust Co.* (Ind.), 22 R. R. R. 189, 45 Am. & Eng. R. Cas., N. S., 189; *Illinois Cent. R. Co. v. Porter* (Tenn.), 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686; *Louisville, etc., R. Co. v. Kingman* (Ky.), 5 Am. & Eng. R. Cas., N. S., 401; *Foreman v. Pennsylvania R. Co.* (Pa.), 17 Am. & Eng. R. Cas., N. S., 246; note, 20 Am. & Eng. R. Cas., N. S., 121.

For the authorities in this series on the subject of a carrier of passengers' duties and liabilities with respect to opening and closing car doors, see foot-note appended to *Crandall v. Minneapolis, etc., Ry. Co.* (Minn.), 20 R. R. R. 478, 43 Am. & Eng. R. Cas., N. S., 478; *Union Pac. R. Co. v. Brown* (Kan.), 20 R. R. R. 448, 43 Am. & Eng. R. Cas., N. S., 448.

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rulings of this court. *Getchell v. Hill*, 21 Minn. 464; *In re Will of Storer*, 28 Minn. 9, 8 N. W. 827; *Peterson v. Railway Co.*, 38 Minn. 511, 39 N. W. 485; *Jones v. Railway Co.*, 43 Minn. 279, 45 N. W. 444. This is conceded by counsel for the defendant; but he urges that the practice sanctioned by the cases cited is wrong in principle and ought not longer to be permitted. We adhere to our former decisions. None of the other rulings of the trial court as to the admission of evidence was reversible error.

The other alleged errors relate to the charge of the court to the jury. The jury were instructed that the alleged contract between the defendant and the United States for the carrying of the mails was an admitted fact. This is urged as error. It was not, for, as already stated, the answer admitted that the defendant was transporting the mails, as alleged in the complaint, in a car furnished for that purpose, and that the plaintiff was a mail clerk in charge of the mails in the car. The complaint alleged the contract by virtue of which the mails were carried.

The trial court also instructed the jury that: "It was the duty of the railroad company to exercise the same degree of care in protecting the plaintiff while riding in its mail car and handling the mail intrusted to him that was due to a passenger on its trains, compatible, of course, with the performance of his own duties as such railway postal clerk while the train is in motion; and this degree of care extends to the obligation to furnish mail cars with suitable doors, and keep them in such repair and condition that they could be opened and shut with reasonable facility, and in this respect it was required to exercise the highest degree of care. * * * So you see, gentlemen, the main and controlling question for you to determine in this case is: Did the defendant company fail to exercise the highest degree of care, skill, and foresight of which it was capable in providing a door that could be opened and shut with reasonable facility, so as to prevent the incursion of cold into such mail car while the same was in motion? And, if so, then did the plaintiff, without any fault or neglect on his part, suffer damages as the result of such negligence on the part of the defendant company?" The defendant insists that the giving of these instructions was error, because it imposed upon the defendant a higher degree of care than the law requires, which is care commensurate with the danger to be provided against; that is, such care as is usual in mail cars. The instructions were correct; for it is clear from the whole thereof that the highest degree of care on the part of the defendant was limited to the furnishing and providing of suitable doors for the mail car and keeping them in such repair that they could be opened and shut with reasonable facility so as to prevent the incursion of cold into the car. This was as favorable to the defendant as it was entitled to have it, for the plaintiff was a passenger on the car.

We find no reversible errors in the record.

Order affirmed.

PIERSON *v.* ILLINOIS CENT. R. CO.

(Supreme Court of Michigan, July 13, 1907.)

[112 N. W. Rep. 923.]

Evidence—Conclusion of Witness.—A statement of plaintiff, testifying in an action against a carrier for wrongful ejection from a train, that he was in no position to meet an assault by the conductor, who seized plaintiff while sitting in his seat and proceeded to drag him out, and that for that reason plaintiff resisted as long as he could, was not objectionable as a conclusion.

Trial—Erroneous Admission of Evidence—Subsequent Exclusion—Necessity of Instruction.—Where immaterial evidence was admitted, but subsequently stricken out as soon as its immateriality developed, the failure of the court to instruct the jury on the matter was not error; no request for an instruction having been made.

Writ of Error—Harmless Error—Exclusion of Evidence.—The exclusion of proper evidence is not prejudicial, where the facts sought to be shown are otherwise proved.

Same—Erroneous Argument of Counsel—Review—Objections in Trial Court.—Where no objection was made to improper argument of counsel at the time, and there was no ruling by the trial court, the court on appeal will not review the matter.

Carriers—Passengers—Wrongful Ejection—Damages—Limitation of Liability.*—Where a passenger, holding a ticket entitling him to transportation on identifying himself as the person who bought it, and stipulating that any claim for damages resulting from any bona fide mistake of any conductor in rejecting proof of identity should be limited to the amount which the passenger paid for the ticket, was ejected by a conductor who did not act in good faith, the passenger was entitled to recover substantial damages, and was not limited to the amount paid for the ticket.

Writ of Error—Assignments of Error—Waiver.—An appellant, who in his brief, in discussing assignments of error, merely stated that any discussion of the same would be a reiteration of the argument in support of previous assignments considered, waived the assignments.

Trial—Issues—Instructions.—Where, in an action against a carrier for ejecting a passenger holding a ticket requiring him to identify

*For the authorities in this series on the question whether a carrier of passengers can limit its liability, or exempt itself from liability, see foot-notes appended to *Baker v. Boston & M. R. Co.* (N. H.), 23 R. R. R. 592, 46 Am. & Eng. R. Cas., N. S., 592; *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603.

For the authorities in this series on the subject of the damages recoverable against a carrier of passengers for refusal or failure to transport a passenger, or delay in transporting him, see foot-notes appended to *Williams v. Carolina & N. W. R. Co.* (N. Car.), 23 R. R. R. 435, 46 Am. & Eng. R. Cas., N. S., 435.

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himself as the purchaser thereof, the declaration did not count on a misdescription of the passenger in the ticket, and the conductor who ejected the passenger testified that the ticket did not describe the passenger, and that he so informed him, an instruction that, if there was a misdescription of the passenger in the ticket, the same was a mistake for which the carrier was liable, and that the carrier could not limit its liability for the negligence of its agents by a contract contained in the ticket, was erroneous, because charging the carrier with negligence not alleged as a ground for recovery, and because it furnished a ground for a recovery whether the regulation requiring identification was or was not reasonably enforced.

McAlvay, C. J., and Moore, J., dissenting in part.

Error to Circuit Court, Calhoun County; Joel C. Hopkins, Judge.

Action by John A. Pierson against the Illinois Central Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Argued before CARPENTER, C. J., and McALVAY, GRANT, BLAIR, MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ.

Williams & Beck, for appellant.

Hatch & Anderson, for appellee.

McALVAY, J. Plaintiff recovered a judgment in an action of trespass on the case against defendant, for damages resulting from being forcibly ejected, by the conductor, from a train of defendant upon which plaintiff was riding as a passenger, between Omaha and Chicago, near Council Bluffs, Iowa. Suit was begun by attachment in the circuit court for Calhoun county, and jurisdiction obtained by the seizure of certain cars of defendant, a foreign corporation.

Plaintiff, on December 12, 1903, purchased and paid for a ticket at Seattle, Wash., at the office of the Oregon Railroad & Navigation Company, from Seattle to Chicago and return, and at the time of purchase signed his name upon the ticket. On the same day he began his journey and traveled on said ticket until he reached Omaha, on December 22d. At the last-named place he took the train of defendant company for Chicago. Before reaching Council Bluffs the conductor on defendant's train took plaintiff's ticket, punched two holes in it, and returned it to him. Either then, or soon after, when the conductor returned, plaintiff's identity with the description on the ticket was questioned by him and fare was demanded. There was a sharp dispute between these two persons as to this fact and as to what actually occurred; plaintiff claiming that he was the person who bought the ticket, and that he offered to identify himself, and the conductor claiming that he refused to identify himself, or to pay his fare. Plaintiff was ejected from the train, and during the altercation he struck the conductor a blow with his fist on

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the forehead. When on the depot platform after he was put off, some conversation occurred between plaintiff, the conductor, and the trainmaster, who was present. Plaintiff then re-entered the car and paid the fare, taking the conductor's receipt therefor. Plaintiff was about 60 years old, and engaged in the business of establishing agencies for burglar alarm clocks. He traveled on the average 18,000 to 20,000 miles a year, and had crossed the continent 12 times on roundtrip tickets. The ticket in question was retained by him and produced in evidence. It was a tourist's excursion ticket good for one first-class passage, having printed on it a contract in 13 paragraphs, and numerous coupons, and also dates of years and months and description of passenger. It is printed in the record, covering seven pages. It is not questioned but that plaintiff was the actual purchaser of this ticket and its lawful owner. The question raised by the conductor was relative to the description of the passenger as punched on the ticket. The punch marks, except those made by different conductors during the journey, were made as usual by the agent who sold the ticket, at the time of the sale. Among other stipulations printed on the ticket was the following: "(10) The holder hereby agrees to establish his identity as the original purchaser by signature or otherwise, whenever requested to do so by any conductor or agent of the line or lines over which this ticket reads, and on failure to do so this ticket shall become thereafter void and may be taken up and full fare collected." The jury returned a general verdict for plaintiff, and also found specially on questions submitted by defendant as follows: (1) Did the plaintiff refuse to offer proofs of identity to the conductor, N. A. Ross, previous to the ejection of said plaintiff from the car in question? No. (2) Did N. A. Ross, the conductor, give the plaintiff an opportunity to identify himself, pay his fare, or leave the car before he removed him? Yes. (3) Did the conductor, N. A. Ross, act in good faith in his dealing with the plaintiff? No. Defendant made a motion for a new trial. On June 26, 1905, said motion was denied and an opinion filed by the court, giving his reasons therefor. On October 14, 1905, defendant filed exceptions to the ruling and decision of the court in denying such motion. Defendant asks this court to reverse the judgment entered upon the verdict of the jury on account of errors claimed to have been committed upon said trial.

As already appears, the principal question in dispute between these parties upon the trial was whether the conductor of the defendant company was justified in ejecting plaintiff from the car. Incidental to this was the question of the amount of force used by him upon the plaintiff, and, if defendant's agent, the conductor, wrongfully ejected plaintiff, the extent of plaintiff's injuries, if any, and the amount of damages he was entitled to recover. Upon all of these propositions under the charge of the court, the jury found in favor of the plaintiff, and there was evidence in the case, which, if believed by the jury, warranted the verdict

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rendered. The errors assigned will be considered in groups: (1) Errors upon the admission and exclusion of evidence; (2) errors based upon improper arguments of counsel; (3) errors upon refusal to give requests to charge; (4) errors committed in the charge of the court; (5) errors upon the decision of the court in denying a motion for a new trial.

1. In relating what occurred at the time he was ejected from the car, plaintiff, among other things, testified that he was sitting in his seat, and was seized by the conductor, who proceeded to drag him out. He then said: "I was in no position to meet any such assault, for that reason I resisted as long as I could." Error is assigned because the court refused to strike this out as a conclusion of the witness. We do not so understand it. The witness gave his position as his reason for resisting in the manner he did. Some testimony was offered under objection and exception as to what occurred when the train afterwards arrived at Ft. Dodge and conductors were changed. It was received, but stricken out as soon as its immateriality developed. Such action is held not to be erroneous; no request having been offered asking the court to instruct the jury upon the matter. *Barnett v. Fire Ins. Co.*, 115 Mich. 247, 73 N. W. 372. Defendant excepted to the exclusion of certain questions propounded to an expert witness. This was not prejudicial, for the reason that the inquiry was pursued in another form of question, and the information secured. *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887. Errors are assigned upon the admission of testimony of an expert witness relative to a general custom of railroads in punching tickets, for the reason that he did not include defendant company; also, for excluding testimony offered in surrebuttal to show the absence of such custom on defendant's road. Defendant's witness, Conductor Ross, admitted that this was the manner of punching tickets on its road. The whole matter was entirely immaterial to the issue. There was no dispute as to how the conductor punched this ticket, nor the effect of such punching, if the question of identification had not been raised.

2. The arguments of counsel claimed to have been improper and prejudicial do not appear in the record. Exceptions do appear taken after the arguments were closed, stating wherein they were improper. Plaintiff denies that the statements claimed were made. The record does not show that objection was made at the time and ruled upon by the court. Therefore this court cannot review it. *Miller v. Lachinan*, 117 Mich. 68, 75 N. W. 284, and cases cited.

3. Twenty-four of defendant's requests to charge were refused, and error is assigned upon each refusal. To give these requests at length and discuss them would be of no benefit to the profession, and is not necessary. An examination of the entire charge of the court shows that the substance of the requests, proper to give the jury, was given.

4. The charge of the court to the jury was given with great

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care, and for the most part appears to have been entirely satisfactory to the defendant. The court correctly stated what was involved in the case, giving clearly and fully the claims of the respective parties. The rights and duties of the plaintiff and the defendant's conductor were fully and repeatedly set forth and defined. Among other things, he said: "It was the duty of the plaintiff, upon demand so to do, by the conductor in charge of the train, to either identify himself to the reasonable satisfaction of the conductor, or pay his fare, or leave the train. The act of the conductor of the defendant company in removing the plaintiff from the car was the act of the defendant company, and rendered it liable to the plaintiff for all his damages, providing such ejection was unlawful, or, if lawful, made with unnecessary force and violence. I instruct you that it was not within the province or authority of the conductor, Mr. Ross, to in any manner change or vary the terms of the ticket presented by plaintiff. Under the terms of that ticket, all that the conductor could do was to pass upon the question of the proper identification of the plaintiff, and if the conductor was reasonably satisfied of the identification of the plaintiff—that is, that he was the same person described in the ticket—then the conductor should have accepted the ticket and allowed plaintiff transportation on that train; but, if you find that, not being reasonably satisfied as to the identification, the conductor asked for the identification, and plaintiff refused to identify himself, then the conductor had no right to accept such ticket or allow transportation on the ticket. I instruct you that, as between the conductor and plaintiff, the right of the latter to travel or be transported by this train was governed entirely by the terms of the ticket, and if you find that the conductor reasonably believed, and had good reason to believe, that such a discrepancy existed, then it was proper for him to ask plaintiff to identify himself, and if you find that he did ask plaintiff to identify himself, and plaintiff refused so to do, then it was proper for the conductor to demand that plaintiff pay his fare in cash or leave the train; and, if you find that the plaintiff in turn refused to do either of these things, then it was proper and lawful for the conductor to use such force as was necessary to put plaintiff off the train; and, if you find that the conductor used only such reasonable force as was necessary, then your verdict must be for the defendant, no cause of action. If you find under the circumstances stated that the conductor used more force than was reasonably necessary, then the plaintiff can only recover for the damages resulting to him, if any, from such excess of force. In determining the question as to whether or not the conductor was justified in ejecting the plaintiff from his train, you should take into account all the evidence in the case bearing upon what occurred at the time the plaintiff first presented his ticket, and what afterward occurred when the conductor returned to the plaintiff while he was still in the train. The provision printed upon the face of the ticket that the pas-

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senger shall, whenever requested by the conductor to do so, identify himself by writing his name or otherwise, is a reasonable regulation, and it would be the duty of Mr. Pierson to comply with a request of the conductor to identify himself, by writing his name, or otherwise, at any time, even though the conductor had accepted and punched his ticket and returned the ticket to the plaintiff, thereby intending to signify his acceptance of the ticket, and thereby canceling the ticket to the end of his run at Ft. Dodge, Iowa. Did the conductor request Mr. Pierson to identify himself by writing or otherwise? And did Mr. Pierson refuse to write his name, or to otherwise identify himself? If you find that he did refuse, after being requested so to do, to identify himself, then the conductor would be justified in ejecting him from the train, using however, no more force than was necessary to accomplish that object. * * * This, gentlemen, is a question of fact to be determined by you under all the evidence in this case, and is really the question upon which the decision of this controversy turns." From these portions of the charge it clearly appears that the court, upon the crucial question in the case, correctly stated the law to the jury.

Defendants assign error upon part of the charge which is as follows: "If you shall find as a fact, from the evidence in the case, that plaintiff purchased the ticket on which he was riding when ejected from the cars of defendant company, or of one who had their tickets, and with apparent authority to sell the same, and paid the fare demanded, and in purchasing the ticket used no fraud, but acted in good faith, then I charge you that, if there was any mistake made in the description of plaintiff on the ticket, it was a mistake for which defendant was liable, and your verdict must be for plaintiff." It is a well-settled rule that a small part of a charge cannot be isolated, and standing alone made the grounds for reversible error, if upon the entire charge it can fairly be said that the jury were not misled. The sentence objected to might well have been omitted. It was not a necessary part of the charge, and was probably induced by a request of defendant based upon a claimed theory of plaintiff relative to a mistaken description in the ticket. Plaintiff did not claim that any mistake had been made in the description contained in the ticket. The case was submitted to the jury upon the theory that plaintiff's rights depended upon the ticket he presented, and that the conductor was within his rights if he demanded identification; the dispute being as to what occurred as to identification. Defendant could not have been prejudiced or the jury misled, because the court later clearly and correctly stated the law.

Defendant also claims that the court erred in charging: "Defendant company, being a common carrier of passengers for hire, cannot limit its liability for the negligence of itself or its agents by any contract contained in the ticket purchased by plaintiff on which ticket he was seeking transportation." This is not claimed to be incorrect as an abstract proposition of law, but that it had

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no application to the case. What has just been said relative to construing the charge as a whole applies here. The paragraph above quoted in this opinion immediately follows the sentence objected to: "It was the duty of the plaintiff, upon demand so to do by the conductor in charge of the train, to either identify himself to the reasonable satisfaction of the conductor, or pay his fare, or leave the train." Neither party questioned what the contract between them was. The court in his charge distinctly and correctly told the jury what they must find in order to hold defendant liable. The error was not prejudicial.

It is also objected that the court did not properly instruct the jury as to the rule of damages governing the case under the ticket contract. This question is raised by exceptions to certain portions of the charge and the refusal to give certain requests. This objection is based upon the eleventh paragraph of the said contract: "It is hereby agreed and understood that any claim for damages by the purchaser hereof arising out of or in consequence of any bona fide mistake of any conductor or agent in rejecting such proofs of identity or in forfeiting this ticket or refusing further passage thereon shall be limited to the amount which such purchaser shall have originally paid for this ticket." It is contended that this case is within the decision of this court in the case of *Brown v. Rapid Ry. Co.*, 130 Mich. 483, 90 N. W. 290, and controlled by it. This case can be distinguished from the *Brown* Case in this: In the case at bar, plaintiff presented a ticket entitling him to transportation, if he was the person who purchased it. It was a ticket good on its face for the distance to be traveled. The only question opened was that of identification. The jury found specially that plaintiff did not refuse to identify himself, and that the conductor did not act in good faith in his dealing with him. This court has held that a passenger presenting a ticket good on its face for the distance to be traveled is entitled to ride, and if wrongfully ejected may recover substantial damages. *Zagelmeyer v. R. R. Co.*, 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514; *Vining v. Det. Ry.*, 122 Mich. 248, 80 N. W. 1080; *Carvey v. D. & M. Ry.*, 133 Mich. 659, 95 N. W. 716. See, also, *Hufford v. R. R. Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859. The court was not in error in refusing to limit the amount of the recovery to the amount paid for the ticket. Other errors assigned upon the charge are either similar to those just discussed, or, from a reading of those portions of the charge objected to, appear to be without merit.

5. The specific errors assigned upon exceptions to the decision of the court in denying the motion for a new trial are expressly waived in appellant's brief. These include all the exceptions relative to the special findings of the jury, and are not discussed. The only exception to said decision not expressly waived, and upon which error is assigned, is in the following words: "Said defendant also excepts to the judgment and decision of the court

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in overruling said motion for a new trial." Of this assignment of error appellant says: "Any discussion of the same would be a reiteration of our argument in support of the previous assignments herein considered." In the absence of discussion, and neglect to call the attention of this court to any specific error committed by the trial court in said decision, and by indicating a reliance upon the discussion of errors committed on the trial, appellant must be held to have waived all errors assigned upon said decision denying the motion for a new trial.

We find no reversible error in the case.

The judgment of the circuit court should be affirmed.

MOORE, J., concurred with McALVAY, C. J.

HOOKER, J. This controversy involves disputed questions of fact as to the circumstances under which plaintiff was ejected from defendant's car and the amount of damage. A claim was made that the conductor acted in bad faith, and the jury so found. Hence it was proper for them to award damages for injured feelings. The matter of bad faith was a question of fact, and any testimony bearing upon it should not have been excluded. The plaintiff offered testimony to the effect that when the ticket was taken the conductor punched it, and that, according to the custom of railroads in general, this was an acceptance of the ticket, and claimed that he could not lawfully raise the question of plaintiff's identity afterwards. If this was the custom of defendant, whether it was of other or not, it is presumable that the conductor knew it, and the jury would be likely to think so, and the same is perhaps true *prima facie* under the proof of a general custom. But, as far as it applies to the question of good faith, it was competent for the defendant to show that there was no such rule or custom on the defendant's road, which would be consistent with the conductor's statement that he did not notice the description of plaintiff until after the ticket was punched, and did not act in bad faith in raising the question after punching the ticket, which was in a sense a usual and involuntary act, on receipt of any ticket. Such testimony was excluded, and was injurious, especially in the light of the following instructions given the jury: "If you find that the conductor punched the ticket when presented to him in the first instance by Mr. Pierson, that fact alone would not constitute an acceptance of the ticket by the railway company, unless you shall find that the conductor so punched the ticket as an act of acceptance, and intending thereby to so accept the ticket, and the question of the length of time the conductor had in which to decide the question of whether or not he would accept the ticket is immaterial. The defendant is bound by this act, whether he had much or little time in which to make his decision." And his refusal to give the following requests: "If you should find that the conductor, in taking up the ticket from plaintiff in the first instance, either through mistake, or by reason of being hurried in his duties, did not notice any discrepancy between the personal description con-

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tained in the ticket and the personal appearance of the plaintiff, neither he nor the defendant were bound to retain that ticket as transportation for the plaintiff without demanding personal identification, the same as the conductor might have done in the first instance if he had noticed the discrepancy, and, after noticing it, it was his duty, and he had the right and privilege as representing the defendant, to bring the matter to the attention of the plaintiff and demand that the plaintiff either pay his fare in cash or reasonably identify himself so that the conductor might be reasonably assured that the plaintiff was a bona fide holder of the ticket or leave the train. Of course, in making any such demand upon plaintiff, it was the duty of the conductor to tender the ticket to the plaintiff"—which request was refused and defendant excepted, and which should have been given.

The following request should also have been given: "It appears in evidence that the plaintiff had with him sufficient money with which to pay his fare in cash, and I instruct you that you may take that fact into consideration in arriving upon your verdict in this case, under the instruction given you by the court"—which request was refused, and defendant excepted. It was proper in mitigation of damages, as was the testimony excluded, hereinbefore referred to.

The judgment should be reversed, and a new trial ordered.

OSTRANDER, J. If it is agreed, as it appears to be, that the regulation calling for identification of the ticket holder is a reasonable one, the vital point in the case is whether the regulation was reasonably enforced. Reasonable enforcement of it was provided for in the contract. Unreasonable enforcement might be a trespass. The declaration does not count upon a misdescription of defendant in the ticket. The court instructed the jury: "If you shall find as a fact, from the evidence in the case, that plaintiff purchased the ticket on which he was riding * * * and paid the fare demanded, and in purchasing the ticket used no fraud, but acted in good faith, then I charge you that, if there was any mistake made in the description of plaintiff on the ticket, it was a mistake for which defendant was liable, and your verdict must be for the plaintiff." Immediately following this, and the two quotations from the charge here given are not qualified and appear to cover the subject, the court said: "Defendant company, being a common carrier of passengers for hire, cannot limit its liability for the negligence of itself or its agents by any contract contained in the ticket purchased by plaintiff, on which ticket he was seeking transportation." The testimony of the conductor who put plaintiff off the train is that the ticket did not describe the plaintiff. He further testified that he told plaintiff the ticket did not describe him. It appears that the supposed lack of correspondence between the description and the man is what caused the demand for identification. Upon this testimony and charge, it seems to me that a verdict for plaintiff was inevitable. The instruction was both erroneous and prejudicial, because it

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condemns defendant for negligence not alleged as ground for recovery, and because it furnishes ground for the verdict, whether the regulation in question was or was not reasonably enforced.

Except as herein stated, I concur in the opinion of MR. JUSTICE MCALVAY. For the error pointed out, I think the judgment should be reversed, and a new trial granted.

CARPENTER, GRANT, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred with OSTRANDER, J.

SOUTHERN RY. CO. v. FLEMING.

(Supreme Court of Georgia, May 14, 1907.)

[57 S. E. Rep. 481.]

Carriers—Expulsion of Passenger.*—One who enters a train, to be transported as a passenger, without having provided himself with a ticket, may be compelled to pay fare at the train rate, instead of the ticket rate; and, if he refuses to pay at the former rate, he may be ejected from the train without subjecting the railroad company to liability for damages, provided the failure of the passenger to provide himself with a ticket is due to his own fault or negligence, and not to any fault or negligence upon the part of the company.

Trial—Failure of Jury to Agree—Remarks of Judge.—After a jury had been charged with the consideration of a case, and had spent one night and a portion of two days in deliberating upon the same, it was within the discretion of the trial judge, upon being informed by a member of the jury that they were "not likely to agree on a verdict," to remand them to their room for further deliberation, remarking to them at the same time: "I would regret, after you have given the case as long consideration as you have, for you to fail to agree on a verdict. I will send you back to your room for you to see if you cannot agree on a verdict"—and there was no impropriety in the conduct or remark of the judge.

(Syllabus by the Court.)

Error from Superior Court, Franklin County; R. B. Russel, Judge.

Action by J. W. Fleming against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. G. & Julian McCurry, for plaintiff in error.

W. L. Hodges, for defendant in error.

*For the authorities in this series on the subject of the right to eject passengers for failure to pay fare, see foot-notes appended to *Missouri, etc., Ry. Co. v. Smith* (Ind. Terr. App.), 21 R. R. R. 688, 44 Am. & Eng. R. Cas., N. S., 688.

As to the right to charge extra fare for failure to procure ticket, see foot-notes appended to *Rivers v. Kansas, etc., Co.* (Miss.), 18 R. R. R. 267, 41 Am. & Eng. R. Cas., N. S., 267.

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BECK, J. 1. An action was brought by Fleming against the Southern Railway Company, in which the plaintiff claimed damages for an alleged wrongful ejection from the train of the defendant. The jury found a verdict in favor of the plaintiff, and the company excepted to a judgment denying it a new trial.

While there are certain circumstances of aggravation alleged in the manner in which the plaintiff was ejected, the suit was brought, not for the recovery of damages because greater force was used than was necessary to accomplish his expulsion, but because of the alleged wrongful ejection from the train, upon which he claimed he had the right to be transported from the point at which he entered the same to his proposed destination, upon the payment of a fare at the rate of three cents per mile for the distance between the two stations. Considering all the testimony most favorable to the plaintiff's case, we fail to find any evidence supporting the finding in his favor. When the conductor, in the course of his passage through the car for the purpose of taking up the tickets and collecting the fares, reached Fleming and asked for his ticket, the latter stated to him that he had no ticket, and stated, as a reason for his failure to procure a ticket, "There was no agent in the office when I called to get a ticket." And the plaintiff continued in his testimony: "I handed him [the conductor] a \$5 bill and told him I would pay fare at the rate of three cents per mile, or I would buy a ticket from Canon [his proposed destination] back to Royston, when I got to Canon. He agreed to this, and took the \$5 bill, and said he would get it changed. In a few minutes he came back, handed me the bill, and said I would have to pay fare at the rate of four cents per mile, as I had no ticket. I refused to pay it, and he told me that unless I paid the fare I would have to get off the train." The plaintiff persisted in his refusal to pay fare at a higher rate than three cents per mile, and he was thereupon expelled from the train. Whether the plaintiff's ejection from the car was authorized and rightful, or unauthorized and wrongful, depends, of course, upon whether he had a right to be transported, as he demanded to be, at the ticket rate of three cents per mile; and that depends upon whether his failure to provide himself with a ticket was due to his own neglect, or to some fault or default of the company. The undisputed evidence in the record shows that up to the time of the arrival of the train the ticket office was open and the ticket agent was present and ready to sell tickets to any one who might apply for them. Under a rule duly promulgated by the railroad commission of this state, ticket offices "at way stations may be closed one minute before the arrival of the trains." And the same rule further provides that when "passengers, for want of proper diligence, fail to supply themselves with tickets before getting on the train, then four cents per mile for each passenger twelve years and over may be demanded and collected." Under the operation of this rule the ticket agent at a way station, such as the one at which the plaintiff entered the

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train, would not be compelled to remain at the office to sell tickets after the train arrives. And, if one intending to become a passenger on the train fails and neglects to apply for a ticket until after the arrival of the train, he cannot complain if the ticket agent should not be in his office and ready to serve him.

In the present case the plaintiff's own testimony affirmatively shows that he lingered at and about a warehouse in the town of Royston until after the arrival of the train, and then went to the ticket office to purchase a ticket, and found the agent absent from that place. Then, unprovided with a ticket, he entered the coach; and the fact of his being unprovided with a ticket being due entirely to his own, and not to the company's, fault, the conductor had the right, under the provisions of the rule of the railroad commission and a regulation of the company in accord with that rule, to collect, and it was his duty thereunder to collect, fare at the rate of four cents per mile. His demand for fare at that rate was lawful and authorized, and should have been complied with by the passenger; and, when the passenger refused to comply, it was the duty of the conductor to expel him from the train. The expulsion of the passenger not being wrongful under any view of the testimony, a recovery against the company was unauthorized. This conclusion is supported by former decisions of this court. In the case of *Georgia Southern Railroad Co. v. Asmore*, 88 Ga. 531, 15 S. E. 14, 16 L. R. A. 53, it was said: "According to sound legal principle, the right of the plaintiff to remain upon the train and be carried on payment or tender of the ticket rate should depend alone upon the fact whether the nonattendance of the ticket agent at the office, or any other fault or default of the company, was the true reason why the plaintiff was not supplied with a ticket. If his failure to have it was due to his own neglect, or to any cause not chargeable to the company, its agents or employees, the tender of the ticket rate had no relevancy whatever to the right of the plaintiff to be carried or to shun ejection from the cars. He might as well have tendered nothing as not enough." And in *Central Railroad Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352, it was said: "Under the law and rules prescribed by the railroad commission of this state, it is the duty of railroad companies to keep their ticket offices open for the sale of tickets for a reasonable time before the departure of trains from all stations, provided that offices at way stations may be closed one minute before the arrival of trains; and it is the duty of passengers to use proper diligence in supplying themselves with tickets before getting upon the trains." In the case of *Coyle v. Southern Railway Co.*, 112 Ga. 122, 37 S. E. 163, it was decided that "one who offers to purchase a railroad ticket to be used upon a given train after the ticket office, so far as relates to the sale of tickets for that train, has been lawfully closed, cannot demand the right to ride upon that train without paying the train rate of fare."

2. The court, upon being informed by a member of the jury

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that they were "not likely to agree on a verdict," sent them back to their room for further deliberation, and, as he did so, said to them: "I would regret, after you have given the case as long consideration as you have, for you to fail to agree on a verdict. I will send you back to your room for you to see if you cannot agree on a verdict." And this action and remark of the court were excepted to on the ground that "it was not in accordance with proper practice, was undue interference by the court with the deliberation of the jury, and was calculated to unduly influence the jury in agreeing on a verdict, and to prejudice the rights of the defendant in the case. Direction to the jury from the court, such as are complained of in this ground of the motion, are entirely within the discretion of the court—a discretion which does not at all appear to have been abused in the present instance.

Judgment reversed. All the Justices concur.

BREHONY *et al* v. POTTSVILLE UNION TRACTION CO.

(Supreme Court of Pennsylvania, May 6, 1907.)

[66 Atl. Rep. 1006.]

Carriers—Assault on Passenger—Negligence.*—In an action by a woman, a passenger on a street car, to recover against the railroad company for injuries received from an intoxicated passenger, where the only negligence alleged was allowing the man to enter the car when he appeared intoxicated, it was error to submit the case to the jury where the evidence showed that there was no appearance of intoxication until he was asked to pay his fare.

Appeal from Court of Common Pleas, Schuylkill County.

Action by William Brehony and Delia Brehony against the Pottsville Union Traction Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

R. H. Koch, for appellant.

George M. Road and *M. A. Kilker*, for appellees.

STEWART, J. A passenger, more or less under the influence of drink, who had refused to pay his fare when demanded, and thereupon became disorderly in resisting the conductor who was attempting to eject him, gave a violent kick directed at the con-

*For the authorities in this series on the subject of the duty of a carrier to protect passengers against other passengers, see foot-notes appended to *Kuhlen v. Boston & N. St. Ry. Co. (Mass.)*, 22 R. R. R. 785, 45 Am. & Eng. R. Cas., N. S., 785.

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ductor, but which struck the plaintiff, Mrs. Brehony, a married woman occupying a seat opposite in the car, and seriously injured her. The action was brought by the injured woman and her husband, William Brehony, against the traction company to recover damages for the injuries sustained, on the ground that the company unlawfully and negligently permitted the person who inflicted the injury to get on the car and ride therein while visibly intoxicated. This is the only negligence charged in the statement filed. We must assume, therefore, that in ejecting the unruly passenger the conductor was strictly in the line of his duty, and that he used no greater violence and created no greater disturbance than the circumstances made necessary.

We have the single question presented, whether it was negligence in the conductor to admit to the car the passenger who afterwards inflicted the injury. The averment in the statement of cause of action is that this person was visibly and plainly intoxicated. The evidence supported the averment. Several of the witnesses say he was drunk. Others say he was visibly intoxicated, and others that they thought he was somewhat intoxicated, but not to a serious degree. All spoke from what they saw of his behavior after he was on the car, and all but one or two derived their opinion from his behavior while in altercation with the conductor. None spoke of his conduct while approaching the car on entering it, and all say that while seated, and up until the altercation arose, he was conducting himself properly, giving no offense to any. It is impossible from the evidence to determine the degree of the man's intoxication. We have simply the case of a man intoxicated by liquor. As that expression is commonly used, it indicates nothing as to the degree. It may mean much, or may mean very little. One thing is clear, the man was not so intoxicated as to require help. He entered the car unaided, and in a way that attracted no attention and excited no comment. The same is true of his conduct in the car until the controversy began. One of plaintiffs' witnesses says that she saw him running to the crossing in order to take the car. The case was submitted to the jury in a charge which did not with sufficient clearness confine the inquiry to the point really in issue; and, in view of the great latitude allowed them, it is impossible to know certainly what the jury found with respect to the intoxication, if anything. In the view we take of the case, it is not material that we should know. The case did not call for a submission. It is the duty of a conductor to exercise a watchful care for the safety of his passengers; and this duty may require him under certain conditions to refuse to admit into his car a person applying. The measure of care he is bound to exercise in doing so we are not now called upon to consider. If one applying for admission bears upon his person signs convincing to the ordinary mind that he is afflicted with a dangerous and contagious malady, it is manifestly the duty of the conductor to exclude him. If one evidently a maniac applies, the duty to reject is quite as

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manifest. If it be said these are extreme cases, the answer is that only in extreme and exceptional cases does the duty arise. In the cases we have mentioned common prudence should inform the conductor that the admission of either would be attended with danger to the other passengers, and it would be negligence in him to allow it. But such danger cannot be affirmed of admitting a person who is simply intoxicated. Intoxication is not infectious; nor does it so ordinarily express itself in violence that disturbance of the peace of the car is to be reasonably apprehended when an intoxicated person is admitted. There may be, and doubtless are, exceptional cases where the intoxication is so gross, the conditions resulting therefrom so offensive, the conduct of the individual so unbecoming and violently, as to justify, and indeed require, his exclusion. If this was the condition of the offending passenger here, so obvious that the conductor should have observed it, such facts should have been made to appear as part of the plaintiffs' case. It was essential to a recovery. The case went to the jury to determine the question of the conductor's negligence from the testimony of witnesses, none of whom saw anything in the appearance or conduct of the man as he entered the car to attract attention or excite suspicion. These witnesses agree in saying that he subsequently gave unmistakable evidence of being intoxicated; but their evidence is in entire accord that up to the time the altercation with the conductor arose he was conducting himself peaceably and inoffensively. That the jury rendered a verdict for the plaintiffs can only be explained on the theory that, under the latitude allowed by the court in the charge, they rested the conductor's negligence upon something not charged, and therefore outside the case. The only question was whether it was negligence to admit this passenger. Defendant's ninth point was: "Under all the evidence in the case the verdict of the jury must be for the defendant." Its refusal is made the subject of the fifth assignment of error. This assignment is sustained.

Judgment reversed.

PARTELOW v. NEWTON & B. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, June 18, 1907.)

[81 N. E. Rep. 894.]

Carriers—Injuries to Passengers—Negligence—Questions for Jury.

—In an action against a street railway company for injuries to a passenger thrown from a car while passing a curve, the question of negligence in running the car at an excessive rate of speed held for the jury.

Same—Instructions.—An instruction, in an action against a street railway company for injuries to a passenger thrown from a car run-

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ning at an excessive rate of speed over a sharp curve, that it was not sufficient to show that the car was going at such speed as to make it probable that there would be a lurch, nor sufficient to show that there was an unusual lurch of the car sufficient to throw a passenger off, but that it must be shown that the speed was so unusual that the servants in charge thereof ought to have realized that the car was likely to lurch more violently than incident to the ordinary operation of cars on curves, was properly refused; the question of negligence being whether the servants were running the car at a rate of speed which, under the circumstances, involved unnecessary dangers.

Same—Negligence—Violation of Rules.*—A violation by employees in charge of a car of the rule limiting the speed of cars while running over curves in the track is a circumstance to be considered in passing on their negligence.

Same.†—To maintain an action against a street railway company for injuries to a passenger thrown from a car while running over a curve in the track, it must appear that the lurch of the car which threw the passenger off was more than is ordinarily to be expected, and that it was due to a defect in the car or track, or a negligent rate of speed, or some other cause for which the company is responsible.

Evidence—Conclusion of Witness.—A statement of the conductor in charge of a car that, while running over a curve in the track the car did not lurch more than any of the single-track cars would do, is admissible as a statement of the result of his observation, though it involves his opinion.

Trial—Comment on Credibility of Witnesses—Statutes—Construction.—Rev. Laws, c. 173, § 80, providing that courts shall not "charge juries with respect to matters of fact," refers only to instructions given after the evidence has been heard and the arguments of counsel concluded, and does not apply to remarks made by the judge during the examination of witnesses.

Appeal—Harmless Error—Improper Comments by Judge on Credibility of Witnesses—Instructions.—The error, if any, arising from the court commenting during the examination of a witness on his testimony and indicating an unfavorable opinion of the credibility of the witness, is not ground for reversal, where the court in its instructions expressly states that the credibility of the witnesses is for the jury, and cautions them against any prejudice in weighing the testimony of the particular witness.

Exceptions from Superior Court, Middlesex County.*

Separate actions by Lillian I. Partelow and by Henry L. Parte-

*For the authorities in this series on the question whether the speed of a car or train may be negligence with respect to passengers, see foot-notes appended to *Alton Light & Traction Co. v. Oliver* (Ill.), 20 R. R. R. 33, 43 Am. & Eng. R. Cas., N. S., 33; foot-notes appended to *Illinois Cent. R. Co. v. Porter* (Tenn.), 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686.

†For the authorities in this series on the subject of the duties and liabilities of carriers of passengers with respect to the jolting of cars or trains, see foot-note appended to *Sanderson v. Boston Elev. Ry. Co.* (Mass.), 22 R. R. R. 857, 45 Am. & Eng. R. Cas., N. S., 857.

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low against the Newton & Boston Street Railway Company. There were verdicts for plaintiffs, and defendant brings exceptions. Overruled.

These are two actions of tort—the first for damages resulting from personal injuries alleged to have been sustained by the first named plaintiff by being thrown from a car of the defendant on which she was a passenger; and the second by her father for expenses, loss of services, etc. The court refused the following instruction requested by defendant:

"There being no evidence of any defect in the car or track, the plaintiff must show, in order to recover, that the car struck the curve at a dangerous and negligent rate of speed. It is not sufficient to show merely that the car was going at such speed as to make it probable that there would be a lurch or jolt, for it is fairly incidental to street car travel that cars should occasionally lurch and jolt, and passengers must be held to contemplate such occurrences. Neither is it sufficient to show that there was in fact an unusual or violent lurch of the car, or one sufficient to throw the plaintiff off. It must appear by other evidence that the speed was so unusual under the circumstances that the defendant's servants ought to have realized before the accident occurred that the car was likely to lurch more violently and dangerously than is incident to the ordinary operation of cars upon curves in the track."

James J. McCarthy, for plaintiffs.

Powers & Hall, for defendant.

SHELDON, J. A verdict could not have been ordered for the defendant in these cases, and the defendant's first request was rightly refused.

There was evidence on which the jury could find that the female plaintiff, hereinafter called the "plaintiff," was in the exercise of due care. She was sitting in one of the seats designed for passengers, and there was nothing to indicate that she had reason to apprehend any special danger by reason of her position on the left-hand end of the front seat. She testified that immediately before the accident, when she became apprehensive by reason of the speed of the car, she endeavored to save herself from possible injury by bracing herself in her seat and grasping the seat and the brass rod at the corner with her hands. This question was plainly for the jury. Indeed, the defendant has not argued to the contrary.

There was also evidence that the car was run at an excessive rate of speed over a somewhat sharp curve on a downgrade, and that this caused an unusually severe jolt or lurch of the car, which threw the plaintiff off and caused the injury complained of. It is true that there was much evidence that the car was running only very slowly, and that there was no unusual or extraordinary lurch or jolt, and it may be that this was the weight of the evidence; but the question was for the jury.

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Spooner v. Old Colony Street Railway, 190 Mass. 132, 76 N. E. 660.

Nor ought the defendant's seventh request to have been given. The criterion of the negligence of the defendant's servants was not whether they ought to have realized before the accident occurred that the car was likely to lurch more violently and dangerously than was incident to an ordinary operation of cars upon curves in the track, but whether they were running the car at a rate of speed which under the circumstances and at that place involved unnecessary dangers. Moreover, there was evidence that a rule of the defendant limited the rate of speed at a place like the one in question to three miles an hour. If this was so, and if the jury found that this rule was violated, that would be a circumstance to be considered in passing upon the negligence of the defendant's servants. *Stevens v. Boston Elevated Railway*, 184 Mass. 476, 69 N. E. 338. But this consideration was wholly omitted from the request.

The defendant rightly contends that it is a matter of common knowledge that from inequalities of surface and necessary curves, switches and guard rails, street cars in their ordinary and proper operation frequently and unavoidably lurch or jolt, and that such occurrences must be considered to be "fairly incidental to the mode of travel, and must be held to have been contemplated by the passenger." *Spooner v. Old Colony Street Railway*, 190 Mass. 132, 134, 76 N. E. 660, and cases there cited. The same rule has been applied to steam railroads. *Foley v. Boston & Maine Railroad* (Mass.) 79 N. E. 7; *Weinschenk v. New York, New Haven & Hartford Railroad*, 190 Mass. 250, 76 N. E. 662. Nor, as pointed out in the two cases last cited, is it enough to use strong or violent language in describing the jolt. To furnish ground for an action against the company, it must appear that the lurch or jolt was more than is ordinarily to be expected, and that it was due to a defect in the car or track, a negligent or dangerous rate of speed, or some other cause for which the defendant can be held responsible. *Sanderson v. Boston Elevated Railway* (Suffolk, Feb. 28, 1907) 80 N. E. 515; *Timms v. Old Colony Street Railway*, 183 Mass. 193, 66 N. E. 797; *Byron v. Lynn & Boston Railroad*, 177 Mass. 303, 58 N. E. 1015; *McCauley v. Springfield Street Railway*, 169 Mass. 301, 47 N. E. 1006. But there was in this case evidence of an unusual and extraordinary jolt, and that this was due to the running of the car at an excessive and dangerous rate of speed. The case comes under the rule of *Spooner v. Old Colony Street Railway*. 190 Mass. 132, 76 N. E. 660.

The defendant's exception to the comments of the judge on the witness Hart called by the defendant raises a more difficult question. The witness was the conductor of the car. He had answered the question as to how much of a swaying or lurch of the car there had been before the plaintiff fell by saying: "Well, I should say not more than any of these single track cars would

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make." No objection was made by the plaintiff to this answer; and it seems to us to have been a proper one. It was of course impossible to measure accurately the lurch of the car, or to describe it so as to enable the jury to determine its amount with exactness. It naturally would be described according to the standard of everyday experience. This is one of the many cases in which a witness may state the result of his observation, although it involves in some measure his opinion or judgment. *Parker v. Boston & Hingham Steamboat Co.*, 109 Mass. 449, 451; *Commonwealth v. Sturtivant*, 117 Mass. 122, 133, 19 Am. Rep. 401; *Commonwealth v. O'Brien*, 134 Mass. 198, 200. The presiding judge interfered and said: "That does not answer the question. He comes here to say that. The other man is just the same way. He is not asked that question." The defendant excepted to this, and thereupon a colloquy ensued between the judge and the defendant's counsel, in the course of which the former said of this witness and another witness of the defendant: "Why should he say it? Both of them have said it and you have not stopped them. * * * They shouldn't do it. It is no use to have them answer that way. Whether they came here to say that, I don't know whether that is so or not, but they shouldn't say it." It is claimed that this, said in the presence of the jury, might well be taken by them to indicate the judge's opinion that the two witnesses referred to, both of whom had given testimony important to the defendant, were not honestly answering the questions asked them, but were attempting improperly to put into the case evidence favorable to the defendant, and had come to court for that purpose; that the jury well might regard it as an intimation that they were not credible witnesses. Our statute provides that "the courts shall not charge juries with respect to matters of fact." Rev. Laws, c. 173, § 80. It is settled that this forbids the judge to express in his charge to the jury any opinion as to the credibility of the witnesses who have testified before them. *Commonwealth v. Barry*, 9 Allen, 276; *Commonwealth v. Foran*, 110 Mass. 179. The defendant's contention is that an expression of such opinion stated to counsel in the course of the trial, in the presence and hearing of the jury, is likely to be as prejudicial as if embodied in the charge, and is within the spirit of the prohibition. And it is true that new trials have been not infrequently given in other states under similar circumstances. *Wheeler v. Wallace*, 53 Mich. 335, 19 N. W. 33; *Cronkrite v. Dickerson*, 51 Mich. 177, 16 N. W. 371; *Lycan v. People*, 107 Ill. 423; *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *State v. Allen*, 100 Iowa, 7, 69 N. W. 274; *State v. Stowell*, 60 Iowa, 536, 15 N. W. 417; *McMinn v. Whealan*, 27 Cal. 300, 319. Other cases to substantially the same effect are referred to in *Blashfield on Instructions to Juries*, §§ 49, 50.

There is undoubtedly force in the defendant's contention; but we do not think that it can be accepted without qualification. Prior to the passage of Gen. St. 1860, c. 115, § 5, now embodied

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in Rev. Laws, c. 173, § 80, a judge might properly state his opinion as to the weight or effect of the whole or any part of the evidence, if only the comment was fairly made and the question was finally left to be determined by the jury. *Porter v. Sullivan*, 7 Gray, 441, 449; *Mansfield v. Corbin*, 4 Cush. 213; *Whiton v. Old Colony Ins. Co.*, 2 Metc. 1; *Davis v. Jenney*, 1 Metc. 221; *Curl v. Lowell*, 19 Pick. 25; *Commonwealth v. Child*, 10 Pick. 253. The rule which prevailed before the passage of our present statute was well stated by Parker, C. J., in the case last cited: "This would seem to raise the question whether a judge may reason upon the facts, and, if he intimates to the jury his own opinion upon the evidence, whether this shall be cause for setting aside the verdict. We know of no rule requiring the judge to con seal his opinion. He is to comment upon the evidence. Is he to do it by merely stating that one witness says this thing and another witness says that? Has he not power to say this evidence is weak and that evidence is strong? For myself, where the evidence on one side is nearly balanced by counter evidence, I endeavor to leave it to the jury to decide which scale preponderates; but if the evidence on one side is strong compared to that on the other side, I think it my duty to make the jury comprehend that it is so." And exactly this was done in *Buckminster v. Perry*, 4 Mass. 593.

In this state of the law our present statute was passed, providing that the judge should "not charge juries with respect to matters of fact," but might "state the testimony and the law." We think it manifest that the word "charge" here refers to the final summing up of the case by the judge to the jury, containing his instructions to them, after the evidence has all been heard and the arguments of counsel concluded. This is the natural import of the word. And it is of some significance that in all the cases which have arisen heretofore under this statute the questions have been raised upon this final summing up by the judge to the jury. See *Com. v. Johnson*, 188 Mass. 382, 389, 74 N. E. 939; *Com. v. Flynn*, 165 Mass. 153, 156, 42 N. E. 562; *Com. v. Walsh*, 162 Mass. 242, 244, 38 N. E. 436; *Cobb v. Covenant Mutual Benefit Ass'n*, 153 Mass. 176, 181, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619; *Com. v. Leonard*, 140 Mass. 473, 480, 4 N. E. 96, 54 Am. Rep. 485; *Sewall v. Robbins*, 139 Mass. 164, 168, 29 N. E. 650; *Com. v. Brigham*, 123 Mass. 248, 250; *Com. v. Foran*, 110 Mass. 179; *Com. v. Barry*, 9 Allen 276; *Harrington v. Harrington*, 107 Mass. 329. The same construction has been given to this word in other states. In *Millard v. Lyons*, 25 Wis. 516, it was said that "the word 'charge' is not intended to include any and every question and answer passing between court and jury. It doubtless refers to the address made by the judge after the case has been closed, when he comments upon the testimony or instructs the jury on any matter of law arising on it." See, to the same effect, *Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758; *Moore v. Railroad Co.*,

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38 S. C. 1, 31, 16 S. E. 781; *Insurance Co. v. Trustees C. P. Church*, 91 Tenn. 135, 18 S. W. 121; *Dodd v. Moore*, 91 Ind. 522; *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. 670; *Sharp v. Hoffman*, 79 Cal. 404, 408, 21 Pac. 846. If the meaning of the word in our statute were otherwise doubtful, the permission given to the court to state the testimony and the law would be decisive; for practically such a statement could be made only in the final summing up to the jury.

The Legislature has chosen to impose this restriction upon the judge in charging the jury. It has not carried the prohibition further. We cannot properly extend the rule so as to cover every remark which the judge may make to counsel during the trial, not addressed to the jury, though uttered in their presence and presumably heard by them. We have no right to restrict the ancient power of the court further than the Legislature has seen fit to restrict it, presumably having in mind the rule which has been often declared in courts of appeal that it is not for every unguarded expression of a judge that a verdict should be set aside and a new trial ordered. *Com v. Johnson*, 137 Mass. 562; *Moseley v. Washburn*, 165 Mass. 417, 418, 43 N. E. 182, and cases there cited; *Phillips v. Beene*, 16 Ala. 720, 723; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 340, 18 N. E. 804, 9. *Am. St. Rep.* 598; *Chicago City Ry. v. McLaughlin*, 146 Ill. 353, 359, 360, 34 N. E. 796; *State v. Gillett*, 92 Iowa, 527, 61 N. W. 169; *State v. Cleary*, 97 Iowa, 413, 66 N. W. 724.

Although the statement of what had occurred which was made in the charge to the jury, doubtless from the memory of the presiding judge, was not strictly accurate in all respects, yet it left all the questions in dispute, including the credibility of the witnesses, to the jury, with an express caution against any prejudice in weighing the testimony of these particular witnesses. While we do not doubt that this court has power to sustain the exceptions of the aggrieved party in any case where the conduct of the presiding justice has indicated an actual attempt to prejudice the jury either as to the credibility of material witnesses or upon any disputed question of fact, we do not regard the case before us as presenting such a question. We see no sufficient reason for disturbing the verdict.

Exceptions overruled.

ENOS v. RHODE ISLAND SUBURBAN RY. CO.

(Supreme Court of Rhode Island, May 13, 1907.)

[67 Atl. Rep. 5.]

Carriers—Who Are Passengers—Employee—Payment of Fare.*—A railroad flagman, who received as compensation for his services a weekly sum of money and transportation tickets on the railroad to convey him to and from his work, was a passenger while riding home on one of the tickets after his day's work had been fully completed.

Same—Actions for Injuries—Prima Facie Case—Negligence.†—A plaintiff, in an action against a carrier for injuries sustained while a passenger, made out a prima facie case of negligence by proof that he was a passenger on one of the carrier's cars which collided with another of its cars, causing the injury complained of.

Action by Antone Enos against the Rhode Island Suburban Railway Company. Judgment for defendant, and plaintiff excepts. Exceptions sustained.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Lewis A. Waterman, for plaintiff.

Henry W. Haynes, for defendant.

DUBOIS, J. At the trial in the superior court, with a jury, it appeared that the plaintiff was employed by the defendant as a flagman, at Baker's crossing, under a contract to receive for his services in that capacity each week the sum of \$8 and 14 transportation tickets, good on the defendant's road. At the time of the accident he was riding in a car of the defendant, having finished his work, having put out the lights at the crossing, and having left the same and his flag, for the night, to go to Lake-wood, his home. In a short time after he had entered the car, it overtook and collided with the defendant's freight train, and

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to *Baker v. Boston & M. R. Co.* (N. H.), 23 R. R. R. 592, 46 Am. & Eng. R. Cas., N. S., 592, foot-notes appended to *Alabama City, etc., Ry. Co. v. Bates* (Ala.), 23 R. R. R. 564, 46 Am. & Eng. R. Cas., N. S., 564; foot-notes appended to *Riley v. Chicago, etc., Ry. Co.* (Neb.), 23 R. R. R. 441, 46 Am. & Eng. R. Cas., N. S., 441; foot-note appended to *Boisen v. Cobbs & Mitchell* (Mich.), 23 R. R. R. 82, 46 Am. & Eng. R. Cas., N. S., 82.

†For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see foot-notes appended to *Egan v. Old Colony St. Ry. Co.* (Mass.), 23 R. R. R. 406, 46 Am. & Eng. R. Cas., N. S., 406; foot-note appended to *McGinn v. New Orleans Ry. & L. Co.* (La.), 23 R. R. R. 398, 46 Am. & Eng. R. Cas., N. S., 398; *Spurlock v. Shreveport Traction Co.* (La.), 22 R. R. R. 854, 45 Am. & Eng. R. Cas., N. S., 854.

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in the collision the plaintiff suffered injury. There was evidence tending to prove that the collision was caused either by the negligence of the crew of the freight train, which had been stopped on the tracks around a curve and just ahead of the car upon which the plaintiff was riding, in not giving some warning signal that it was so stopped, or by the negligence of the motor-man of the car carrying the plaintiff, or through a defective brake on that car. At the conclusion of the testimony for the plaintiff he was nonsuited by the court, upon the ground that he was a fellow servant of the defendant with the one whose negligence caused his injury; and, also, that the evidence regarding the defective brake was insufficient to charge the defendant with negligence. A motion for a new trial, on the ground that the decision was against the law and the evidence, was denied, and the case is now before this court upon the plaintiff's bill of exceptions, which raises the following questions: (1) Was the plaintiff a passenger or a fellow servant? (2) Has the plaintiff made out a *prima facie* case of negligence? (3) Was the plaintiff, as a matter of law, guilty of contributory negligence? (4) Was the evidence that the brake did not work sufficient in itself to carry the case to the jury?

1. "The general rule is that every one on the passenger trains of a railroad company and there for the purpose of carriage with the consent, express or implied, of the company, is presumptively a passenger." Elliott, Railroads, § 1578. "As to whether an employee riding on a train is a passenger there is some conflict, but the rule seems to be that if he is being carried to and from his working place he is not a passenger, but if he is carried for his own convenience or business he is a passenger." Id. But the same author, in the same section, also states: "Persons who pay a consideration for passage, no matter in what form, are generally regarded as passengers." In the case at bar, the plaintiff earned 14 tickets, as well as \$8, per week, and the fact that the tickets were purchased by work, instead of cash, is unimportant. The fact that they were bought, and not given to him, is important, because such a ticket paid for his passage home in the car in which he was riding at the time of the collision; and the fact that his passage was so paid after his day's work was fully completed made him a passenger after his employment had ceased for that day. He had left Baker's crossing and the flag and lights and other instruments with which he had guarded it, and there was no way in which, during his ride to Lakewood, he could continue his employment of flagman at the crossing they had left. He could not take it or its responsibilities with him, nor was there any way in which he could render service there while he was traveling away from it. There are two conspicuous features noticeable in the plaintiff's case: His place of labor was fixed, and his transportation was earned. The distinction between cases of gratuitous carriage and those in which transportation has been paid for in any manner has been clearly recog-

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nized, with the result that generally the persons carried in the latter have been held to be passengers, while those transported in the former have not. As was said by Sterrett, J., in *McNulty v. Penna. R. Co.*, 182 Pa. 479, 483, 38 Atl. 524, 525, 38 L. R. A. 376, 61 Am. St. Rep. 721: "In the case at bar, the transportation from and to his home to which the deceased, McNulty, was entitled, was not in any sense a service or connected with any service that he was rendering to the defendant company, but it was a service which the latter by the terms of its contract was required to render to him. He was under no obligation to ride on the cars, but there was an obligation on the part of the company to afford him an opportunity of doing so, if he saw fit to avail himself of it; and when he exercised the right to which he was thus entitled, and entered the car for the sole purpose of being transported to Bristol, he was a passenger in the full sense of the word, and not an employee of the defendant. Before he did so, his day's service to the company was fully completed, and he had earned the \$1.20, together with the right of transportation to Bristol." This case sustains the case of *O'Donnell v. Railroad Co.*, 59 Pa. 239, 98 Am. Dec. 336, in which the court says: "The work of the plaintiff was wholly at the bridge. * * * At the time of the accident he had finished his day's work, and was 10 or 12 miles from the bridge on his way home. Under these circumstances, the court below instructed the jury that the plaintiff was traveling as a passenger, and not in the capacity of a servant. * * * He was not hired to pursue his business on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was performed, he was no longer in the service of the company, but was free to go or stay, and when he traveled in effect paid his fare out of his wages." This case was criticised in *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36, as follows: "Of a contrary import is the case of *O'Donnell v. A. V. R. R. Co.*, 59 Pa. 239, which is in conflict with the rule which obtains in this state, and is not sound law." But referring to these decisions, Labatt, on Master & Servant (section 642e, vol. 2, pp. 1833, 1834), comments as follows: "The differentiating factors relied on by the court" in the *O'Donnell Case* "were that the deduction from his wages made him a paying passenger; that his duties had been completed before he boarded the train; and that he was not carried merely for the convenience of his employers, and without any contract of carriage. This ruling embodies, as the present writer ventures to think, a doctrine which is more in harmony with the common law conception of the effects of the existence or absence of a specific consideration for the transportation than a New York Case [*Vick v. Railroad Co.*, *supra*], in which substantially the same facts were presented, and in which the Pennsylvania doctrine was expressly disapproved. The hypothesis that a servant who submits to a reduction of his wages in consideration of being carried acquires no

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additional rights, as compared with a servant whose right to be carried cannot be put higher than a mere 'permissive privilege' seems to be quite anomalous. Whether in any particular instance a special bargain has been made which exempts the servant from the operation of the doctrine of common employment must be determined with reference to the terms of the contract." In the case of *Dickinson v. West End Railway*, 177 Mass. 365, 368, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284, the court used the following language: "At the time of the accident he did not stand in the relation of a servant to the defendant. His time was his own, and he owed the defendant no duties until the time arrived for resuming his work. It was no part of his duty to the defendant, as a servant, to take the car on which he was riding and go to a particular place for his dinner. He might go where he pleased and when he pleased during the interval before coming back to his work. This case is different in this particular from cases in which the plaintiff was riding in the line of his duty in the course of his employment. * * * His rights were the same as if, after finishing his day's service, he had taken a car in the evening to visit a friend, or to do any business of his own. The fact that he had been in the defendant's service during the day would not make him a fellow servant with the motorman." It has even been said that: "The weight of authority and of sound policy, we think, is that where a servant performs all his work at a fixed place, and the master, either by custom or as a gratuity, carries him to and from his work, the servant doing no service for the master on the train, he is to be treated as a passenger." *Transit Co. v. Venable*, 105 Tenn. 460, 469, 58 S. W. 861, and cases cited. The defendant argues that the cases of *Ionnone v. N. Y., N. H. & H. R. R. Co.*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812, and *Shannon v. U. R. R. Co.*, 27 R. I. 475, 63 Atl. 488, control the case at bar. The difference between gratuitous carriage and transportation which has been earned or paid for was clearly pointed out in the *Ionnone Case*, which was one of gratuitous carriage, and was decided upon that very ground; while the *Shannon Case* was one in which the plaintiff was injured while being carried from place to place in the course of his employment for the convenience of the employer. They are therefore clearly distinguishable from the present case. The plaintiff offered testimony that should have been submitted to the jury for consideration under proper instructions. The court therefore erred in granting the defendant's motion for a nonsuit. The plaintiff did make out a *prima facie* case of negligence, by proof that he was a passenger in a car of the defendant which collided with another of its cars in the circumstances in which the collision occurred, as previously narrated. There was nothing in the testimony presented that indicated that the plaintiff was guilty of contributory negligence.

2. By the fourth question we understand the plaintiff to in-

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quire, assuming all his other intentions to have been decided adversely, whether he still has a case to go to the jury on the evidence that the brake did not work. In view of the conclusion we have already reached, it becomes unnecessary to answer this question. Nevertheless, it is proper to say that the evidence of an inefficient brake is coupled with evidence that the motorman made no attempt to have it remedied, or to obtain another car, although he passed the car barn several times after he discovered the defective condition of the brake. This would indicate negligence on the part of the motorman, a fact available to the plaintiff if a passenger, but not if a fellow servant.

The plaintiff's exceptions are therefore sustained, and the case is remanded to the superior court for a new trial.

LINDSAY *v.* OREGON SHORT LINE R. CO.

(Supreme Court of Idaho, June 14, 1907.)

[90 Pac. Rep. 984.]

Carriers—Expulsion of Passenger—Pleading—Complaint.—Under the provisions of subdivision 2, § 4168, Rev. St. 1887, the complaint must contain a statement of the facts constituting the cause of action in ordinary, concise language, and in an action for damages it is sufficient under our statute to allege in general terms that the injury complained of was occasioned by negligence of the servant or employee of the carrier in charge of the train.

Same—Evidence.—Evidence held sufficient to show that the brakeman did expel the respondent from the train.

Same.—It is the duty of the common carrier to afford protection for its passengers, and, if it has in its employ a brakeman who ejects a passenger from the train who is entitled to ride, the company is liable.

Same—Damages.*—Where a passenger is wrongfully ejected from a passenger train, he is entitled to recover a reasonable compensation for the indignity, humiliation, and mental suffering received and resulting from such expulsion, whenever such mental suffering or nervous shock is the natural and proximate result of the wrong done, if such wrong gives the party a cause of action.

Same.*—In this case a husband with his sick wife entered the train. He was ejected therefrom, and his wife was carried on the train. His anxiety and mental suffering was the proximate result of the unwarranted act of the servant, which was the direct and sole cause of such suffering.

*See foot-notes appended to *Sappington v. Atlanta & W. P. R. Co.* (Ga.), 22 R. R. R. 846, 45 Am. & Eng. R. Cas., N. S., 846.

For the authorities in this series on the question whether there may be a recovery for mental suffering in personal injury and negligence cases, see foot-notes appended to *McDermott v. Severe* (U. S.), 21 R. R. R. 628, 44 Am. & Eng. R. Cas., N. S., 628.

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Husband and Wife—Injuries to Wife—Action—Joinder of Parties.
—Under the provisions of section 4093, Rev. St. 1887, the husband must be joined with the wife when she has a cause of action for personal injuries, and, if the husband has a separate and distinct cause of action for personal injuries to himself, he is not bound to join his cause of action with that of his wife.

Same—Instructions.—The refusal to give certain instructions reviewed and held not error.

Same.—The giving of certain instructions reviewed, and held not error.

(Syllabus by the Court.)

Appeal from District Court, Bear Lake County; Alfred Budge, Judge.

Action by George E. Lindsay against the Oregon Short Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

P. L. Williams, F. S. Dietrich, and D. Worth Clark, for appellant.

A. B. Gough and J. C. Rich, for respondent.

SULLIVAN, J. This action was brought to recover damages on account of the alleged wrongful expulsion of the respondent from one of the appellant's passenger trains at Deweyville, Utah, on or about the 19th day of August, 1905. The respondent alleges, among other things, that in the morning of that day he with his wife, who was ill, went to the station at Deweyville for the purpose of taking passage upon appellant's passenger train for his home at Montpelier, Idaho; that he had a ticket which entitled him to passage on that train; that he boarded the train, and, as he approached the door of one of the coaches thereof, the brakeman thereon, an agent and employee of the appellant company, did "maliciously, wantonly, willfully, negligently, and wrongfully" order respondent off of said train, and placed himself between respondent and the door of said coach and refused to permit him to enter said coach, or any coach; that he took hold of respondent's shoulder, and turned him from said door and commanded and thus compelled him to leave said train; that respondent's wife was a passenger on said train, and was in a feeble, weak, and helpless condition, and required his care and attention, of which fact he informed said brakeman. General damages in the sum of \$975 and special damages in the sum of \$25 were prayed. Demurrer to the complaint was overruled and an answer was filed, denying generally the allegations of the complaint. The cause was tried by the court with a jury, and a verdict was rendered in favor of the respondent for the sum of \$300, and a judgment entered thereon. An order denying a new trial was made, and this appeal is from that order.

The first error assigned is that the court erred in overruling the demurrer to the complaint. It is contended by counsel for

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appellant that it is necessary in such an action as this to allege that the servant was acting within the scope of his employment. Subdivision 2, § 4168, Rev. St., provides that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language. It is alleged in the complaint that certain wrongful acts were committed by the brakeman, the agent and employee of the defendant company, on its train. It is sufficient under our practice act to allege in general terms that the injury complained of was occasioned by the negligence of the servant or employee of the carrier in charge of the train. 15 Ency. Pl. & Pr. 1132; 6 Cyc. 547, 627. The allegation is sufficient.

Under other assigned errors the theory of the appellant is that the respondent voluntarily left the train at the suggestion of the brakeman, notwithstanding the fact that he had a ticket which entitled him to passage, and that his sick wife was on the train, who greatly required his care and attention. The said brakeman testified that he did not eject the respondent from the train, but the testimony of the respondent himself and two other witnesses convinced the jury that the brakeman did expel the respondent from the train. The defendant himself testified as follows: "I picked up my baggage, and started to follow my wife into the car, and, as I started to go in, the brakeman slid in front of me, and put his hand on my shoulder and whirled me around, and says, 'Here, you had better get off.'" The sick wife testified as follows: "I heard loud talking on the outside of the coach, in the vestibule thereof, and there and then heard some person say, 'You had better get off this train.'" Another witness testified as follows: "The brakeman demanded him to get off and demanded him several times. Then Mr. Lindsay got off." We think that the action of the brakeman fully justified the respondent in getting off the train rather than waiting until he was kicked off or forcibly put off.

It is contended by counsel for the appellant that the brakeman had no authority to expel a passenger, and for that reason was acting outside of his authority, if he had expelled him, and the company would not be liable therefor. There is nothing in this contention, for the correct doctrine on this point is laid down in 3 Thompson on Negligence, § 3176; Patterson on Railway Accidents, § 111; 6 Cyc. p. 561. As stated in the last cited authority, it is the duty of the carrier to afford protection for its passengers, and, if it has in its employ a brakeman who ejected a passenger from a train who was entitled to ride, the company is certainly liable.

There was certain evidence introduced as to the anxiety of the respondent on account of the condition of his wife. Counsel for appellant contend that this is not a legitimate item of damages; that damages cannot be recovered for mental distress and anxiety in this case, and cites a number of authorities sustaining that position. There is a clear distinction drawn in the cases as to

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what anxiety and mental suffering a plaintiff who is expelled or ejected by a common carrier may recover for, and we think the correct rule in cases like the one at bar is clearly stated in Moore on Carriers, p. 887, as follows: "Where a person has been wrongfully and unlawfully expelled or ejected by the carrier from a train or car, he may recover in an action against the carrier the amount of the fare to the place to which he was entitled to be carried, damages for the loss of time occasioned by the delay, and any other pecuniary loss necessarily caused thereby and proven to be a proximate result of the ejection, and a reasonable compensation for the indignity, humiliation, wounded pride, and mental suffering involved in and resulting from such wrongful expulsion." Sutherland, in his work on Damages (volume 3 [4th Ed.] § 943), states the rule as follows: "We conceive the correct rule to be that mental suffering or nervous shock may be recovered for whenever it is the natural and proximate result of the wrong done, if such wrong gives the injured party a cause of action." See, also, 8 Am. & Eng. Enc. of Law, (2d Ed.) p. 669, and 5 Am. & Eng. Enc. of Law, p. 707. If the plaintiff had a right of action for being expelled from the train on which he had taken his sick wife, we think it is clear that he can recover for his anxiety and mental suffering on account of thus being separated from her. The unwarranted acts of the servant of the appellant was the direct and sole cause of such separation. As bearing on this question, see *Vogel v. McAuliffe*, 18 R. I. 791, 31 Atl. 1; *Alabama G. S. R. R. Co. v. Sellers*, 9 South, 375, 93 Ala. 9, 30 Am. St. Rep. 17. In *Procter v. Railroad*, 62 Pac. 306, 130 Cal. 20, it was held that a woman might recover for mental distress for being separated from her baggage. If this is the correct rule, we think that a husband might be entitled to recover for mental distress for being put off from a train on which he was traveling with his sick wife, and it is suggested by counsel for respondent that a man's wife ought to sustain as close and sacred relation to him as a woman's baggage to her.

Supplemental answer was filed in this case, in which was set forth in substance *res adjudicata*, and in support of that plea upon the trial the appellant offered in evidence the judgment roll in the case of *George E. Lindsay and Wife v. Oregon Short Line Railroad Company*, in which case a judgment had been rendered for the defendant. It appears that that was an action prosecuted by the plaintiffs to recover damages on account of the physical injury and pain and agony suffered by Mrs. Lindsay. This action arose from the fact of the unlawful ejection of the husband from the train, for which unlawful act this action is prosecuted by the husband himself. It is contended that but one wrongful act is involved, and the damages being community property, plaintiff could not split his cause of action and bring one action on account of damages to Mrs. Lindsay and then bring another action for his own wrongful expulsion from the

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train. It is made necessary by our statute for the husband to join with the wife in an action for damages for personal injuries to herself where the proceeds recovered is community property, and it is conceded that whatever could have been recovered, if anything, in that action would have been community. Section 4093, Rev. St. 1787. The wife, under that section, could not sustain her action to recover for personal injuries without joining her husband with her. This action the husband has brought on his own account for injuries sustained by himself, and the wife is not a proper party plaintiff in this action. The other action referred to, which was brought for injury to the wife, required judgment, if any, to run to both husband and wife, and in the case at bar the wife is not the necessary party. The wife, if she has a cause of action for personal injuries, must join her husband in the action. The husband, if he has a cause of action, need not join the wife in order to have judgment rendered in his favor. The court did not err in rejecting said judgment roll as the defendant's *res adjudicata* was not well taken or pleaded.

Other assignments of error go to the refusal of the court to give certain instructions requested by counsel for the appellant, to the effect that the acts complained of must not only have been wrongful and negligent under the pleading, but that they must have been willfully wrong. We do not think there is anything in this contention, as we are clearly of the opinion that under the allegations of the complaint the defendant might recover for ordinary negligence.

The refusal to give certain other instructions requested by counsel for the appellant is assigned as error; but, after an examination of these instructions, we are satisfied that the court did not err in refusing to give such instructions. The giving of certain instructions by the court is assigned as error. We think that the court correctly stated the law in those instructions, and that there was no error in giving them.

Counsel for appellant insists that the court instructed the jury in substance that they might award punitive damages to the appellant. We hardly think that the instructions taken as a whole go to that extent, and we think there was no prejudicial error in giving those instructions, and from the small amount of the verdict rendered it does not indicate that the jury gave any punitive damages, and we think the evidence fully justified the amount of the verdict rendered.

The judgment is affirmed, with costs in favor of the respondent.

AILSHIE, C. J., concurs.

ATLANTA & W. P. R. Co. v. POTTS.

(Supreme Court of Georgia, May 17, 1907.)

[57 S. E. Rep. 686.]

Carriers—Action by Passenger—Punitive Damages.*—When, in the trial of an action against a railroad company, it appears that the plaintiff, who was a passenger, was pushed from a moving train by the conductor (although it was moving slowly), at a station at which he did not wish to alight, and as a result sustained injury, an instruction to the jury on the subject of punitive damages was not inappropriate.

Same—Evidence.—The evidence authorized the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Troup County; A. D. Freeman, Judge.

Action by Paul Potts against the Atlantic & West Point Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Dorsey, Brewster & Howell and *A. H. Thompson*, for plaintiff in error.

S. Holderness and *F. M. Longley*, for defendant in error.

COBB, P. J. Potts sued the railroad company for damages, and recovered a verdict for \$1,000; and the defendant assigns error upon the refusal of the judge to grant a new trial. Taking the evidence most strongly in favor of the plaintiff, it shows that he was a passenger upon the train of the defendant, with a ticket to Gabbottville; that, while the train was approaching a station and decreasing its speed, the conductor announced Gabbottville, and the plaintiff went upon the platform and was proceeding to alight, when he told the conductor that the train was not approaching Gabbottville, but Cannonville. The train was still in motion, but running slowly, and the conductor said, "Get off! get off! I am not going to get any slower," and placed his hand upon the shoulder of the plaintiff and thereby pushed him from the train. As a result of the fall he sustained injuries, causing much pain and suffering. The charge of the judge contained an instruction upon the law of punitive damages; and this is as-

*For the authorities in this series on the subject of the right to recover punitive or exemplary damages for wrongs to passengers, see foot-notes appended to *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 23 R. R. R. 284, 46 Am. & Eng. R. Cas., N. S., 284; foot-notes appended to *Williams v. Carolina & N. W. R. Co.* (N. Car.), 23 R. R. R. 435, 46 Am. & Eng. R. Cas., N. S., 435; *Williamson v. Central of Georgia Ry. Co.* (Ga.), 23 R. R. R. 57, 46 Am. & Eng. R. Cas., N. S., 57.

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signed as error, for the reason that there was no evidence authorizing it. Punitive damages are recoverable in any case where the act of the defendant causing the injury is willful or wanton. If the act of a conductor of a train in pushing a passenger from a moving train is not willful and wanton, it is hard to conceive of a case which would answer to this description. In Drysdale's Case, 51 Ga. 644, gross negligence in an act producing injury was held sufficient to authorize the jury to increase the damages by way of punishment. The present case, however, is well within the rule laid down in O'Bryan's Case, 119 Ga. 147, 45 S. E. 1000, and the cases which that case followed.

Complaint is made that the court erred in the following charge: "The plaintiff claims that he sprained his ankle and suffered great physical pain and mental distress and anguish. I cannot give you any rule by which to measure the damages that you would give the plaintiff, provided you find that the defendant is liable to the plaintiff. In such cases the only rule I can give you as to measure of damages is this: In such cases no measure of damages, the law says, can be prescribed, except the enlightened conscience of impartial jurors"—the error assigned being that there was no evidence of mental distress and anguish. While the plaintiff does not in terms say that he suffered both in body and in mind, he does recount the circumstances under which he was pushed from the train, and states that he suffered much pain at the time of the injury and thereafter, and still suffers pain. While it might be said that his language refers merely to physical pain, yet, when the circumstances under which he was injured are considered, it is necessarily to be inferred that the pain suffered by him was both mental and physical. The character of the injury, the circumstances under which it was inflicted, and the positive evidence of the plaintiff that he suffered pain, were all before the jury; and we think this was sufficient to authorize a charge on both mental and physical suffering. The evidence authorized the verdict, and we see no sufficient reason for reversing the judgment.

Judgment affirmed. All the Justices concur.

BURNS v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota, June 21, 1907.)

[112 N. W. Rep. 412.]

Street Railroads—Corporate Powers—Extent—Who May Question—Advertising in Cars.—The publisher of a weekly newspaper, containing, among other things, advertisements, sought to enjoin a street railway company from placing advertisements on the upper inside parts of its cars, because, as a result, that company diverted a large and lucrative business, which otherwise he might have been able to secure. It is held that this was not sufficient to entitle plaintiff to litigate the question whether the acts of the defendant were ultra vires or not.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; William Louis Kelly, Judge.

Action by James H. Burns, doing business as St. Paul Herald, against the St. Paul City Railway Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

W. E. Dampier, for appellant.

Munn & Thygeson, for respondent.

JAGGARD, J. The plaintiff and appellant, the publisher of a weekly newspaper, containing, among other things, advertisements, sought to enjoin the defendant and respondent street railway company from placing advertisements on the upper inside parts of its cars, because, as a result, the defendant unlawfully diverted from the plaintiff a large and lucrative business in advertising, and infringed upon the rights and business of the plaintiff. From an order sustaining a demurrer to the complaint, this appeal was taken.

The initial question concerns plaintiff's right to litigate the question whether the defendant railway company exceeded its corporate powers in so receiving and placing advertisements, because he, as an individual, has thereby suffered special damage. With a vivacity that is refreshing and a plausibility that is rather surprising, counsel for plaintiff has marshaled authorities to the effect that "this application is not a pathbreaker. The path is not only broken, but is well paved—macadamized with precedents." The authorities to which he calls our attention in this connection fall into two groups. In the first are cases in which courts of equity have interfered, not only upon the information of the Attorney General, but also upon the information of private parties directly affected, to enjoin public nuisances or trespasses. *Story, Eq. Jur. § 924*, note "a"; *Miss. R. Co. v. Ward*, 2 Black [U. S.] 485, 17 L. Ed. 311; *Sparhawk v. Union Pass. Ry.*, 54

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Pa. 401; *Ewell v. Greenwood*, 26 Iowa, 377; *Zabriskie v. Jersey City, etc., Ry. Co.*, 13 N. J. Eq. 314; *Green v. Oaks*, 17 Ill. 249; *Pettibone v. Hamilton*, 40 Wis. 402; *People v. Third Av. Ry. Co.*, 45 Barb. (N. Y.) 63. These authorities are not in point. By no reasonable construction can the acts of the defendant be regarded either as a nuisance or a trespass.

In the second group are cases in which a court of equity has restrained corporate officers from exceeding their corporate powers. *Wilts & Berks v. Swinden Waterworks Co.*, 9 Chan. App. 451, concerned essentially the right of one riparian proprietor to prevent any other riparian proprietor above him from diverting a stream so as to cause that stream to flow otherwise than in its accustomed channel. See Sir W. M. James, L. J., at page 457. Neither on facts nor on principle does this case support plaintiff's contention. What he regards as the "leading and determining case on the subject" (*Atty. Gen. v. Great Northern Ry. Co.*, 1 Drewry & Sm. Chan. Rep. 154) involved the information of the Attorney General upon the relation of a stranger to the company against the Great Northern Railway Company. It was held that the Attorney General could sustain information on behalf of the public to restrain the railroad company from carrying on the business of coal merchants. That the state, proceeding through the Attorney General, may restrain a company from such ultra vires adventures, is incontrovertible. That a stranger, acting without the Attorney General, as was undertaken to be done here, is in no such position, is equally incontrovertible. In *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1, plaintiff, on behalf of himself and other stockholders in a railway company, restrained "the directors committing a breach of trust," viz., "by guarantying certain profits, and securing the capital of an intended steamer packet company, who was to act in connection with the railway company." So in *Sanford v. Railway Co.*, 24 Pa. 378, 64 Am. Dec. 667, it was alleged that the complainant was a stockholder of the railroad company. It was held that an injunction would issue on the petition to restrain the railroad company from carrying on business in pursuance of an illegal contract granting to one express company the exclusive right of transportation. In the case at bar, the plaintiff was in no wise connected with the defendant company as a stockholder or otherwise.

Apart, however, from specific decisions, we are at a loss to see why the plaintiff has any occasion to seek equitable relief. His damages, if they exist at all, are entirely conjectural and extremely remote. The advertising business was incidental to the running of cars. Incidental thereto was the expenditure of considerable sums of money. That, incidentally, might result in a decrease in newspaper advertising. That, incidentally, might take from plaintiff's paper advertisements which might otherwise have come to it. Even if the street car company exceeded its powers, which, as at present advised, we think it did not, plain-

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tiff's damage is too remote to give him any standing in a court of equity.

Counsel's quotation from *Troilus and Créssida*, act II, scene 2, is apt:

"There is a law in every well ordered nation
To curb these raging appetites that are
Most disobedient and refractory."

We conclude, however, that plaintiff has not shown himself entitled to raise the question in this case whether defendant's "appetite" was "disobedient and refractory."

Affirmed.

PITCHER v. OLD COLONY ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Norfolk, June 20, 1907.)

[81 N. E. Rep. 876.]

Carriers—Street Railroads—Injuries to Passengers—Negligence—Questions for Jury.—Plaintiff was a passenger on an ordinary street car, having seats running lengthwise on each side. As she was leaving the car, she stumbled over a bag which another passenger had placed on the floor, and fell, receiving the injuries complained of. The bag did not obstruct the free passage of plaintiff from the car, and did not render the passageway dangerous to a person exercising due care. Held, that the conductor was not negligent as a matter of law in suffering the bag to be placed and to remain on the floor.

Same—Care Required.*—In an action for injuries to a street car passenger by falling over another passenger's bag, deposited in the aisle, the court properly refused to charge that the carrier was bound to use the highest possible degree of care and caution to keep the aisles, entrances, and exits of its cars free from obstructions, and to exercise toward plaintiff the utmost care and diligence in providing against those injuries which could be averted by human foresight; the carrier only being bound to exercise the highest degree of care consistent with the practical operation of its business.

Same—Evidence—Racks—Custom.†—In an action for injuries to a street car passenger by falling over another passenger's bag placed in the aisle, evidence that it was not customary to have racks for baggage or parcels in street cars, and that it was the custom to allow passengers to put hand baggage and dress-suit cases on the floor, was admissible as bearing on the question whether defendant exercised due care in the premises.

*For the authorities in this series on the subject of the degree of care required of street railways as carriers of passengers, see *Verrone v. Rhode Island Sub. Ry. Co.* (R. I.), 21 R. R. R. 685, 44 Am. & Eng. R. Cas., N. S., 685; foot-note appended to *Whilt v. Public Service Corp.* (N. J.), 21 R. R. R. 423, 44 Am. & Eng. R. Cas., N. S., 423.

†See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

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Exceptions from Superior Court, Norfolk County.

Actions by Martha E. Pitcher and by George A. Pitcher against the Old Colony Street Railway Company. Verdict was rendered in favor of defendant in each case, and plaintiffs bring exceptions. Overruled.

Lafayette G. Blair and *Charles S. Hill*, for plaintiffs.
Asa P. French and *Jas. S. Allen, Jr.*, for defendant.

MORRISON, J. The female plaintiff, whom we shall speak of as the plaintiff, stumbled in the act of leaving the car, over a bag or satchel which another passenger had placed upon the floor and pitched forward striking her head against the door, and receiving the injuries complained of. The plaintiff was seated near the middle of the car, and the jury found in answer to a question submitted to them by the presiding judge that the car was of the ordinary street passenger car type with a seat running lengthwise of the car on each side. The jury also found in answer to questions specially submitted to them by the presiding judge that the accident was not caused by the conductor's negligence, and that the plaintiff was not in the exercise of due care, and returned a general verdict for the defendant. The cases are here on exceptions by the plaintiffs to the admission and exclusion of evidence, to the refusal to give certain rulings that were requested, and to certain instructions that were given.

The answers of the jury to the questions that were submitted to them were in the nature of special findings (*Ellis v. Block*, 187 Mass. 408, 414, 73 N. E. 475; *Spurr v. Shelburne*, 131 Mass. 429; *Mair, Ex'r, v. Bassett*, 117 Mass. 356); and if there was evidence warranting a finding that there was no negligence on the part of the defendant or that the plaintiff was not in the exercise of due care and there was no error in respect thereof in the rulings or instructions or the admission or exclusion of evidence, then the verdict must stand even though there may have been error in respect to the other branch of the case.

We think that there was evidence warranting the finding that there was no negligence on the part of the defendant, and we see no error in regard to the instructions or the refusals or in the admission or exclusion of evidence relating thereto. Considering the character and description of the car it could not be ruled as matter of law that it was negligent for the conductor to suffer the bag to be put and to remain on the floor, and the jury must have found under the instructions of the court that it was not so placed as to obstruct the free passage of the plaintiff out of the car, or to render the passageway dangerous to a person in the exercise of due care. The defendant was not bound as the plaintiff asked the court to instruct the jury, "the exercise towards her the utmost care and diligence in providing against those injuries which can be averted by human foresight," but, as the court instructed the jury, it owed to her "the highest degree

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of care which was consistent with the practical carrying on of its business." *Nichols v. Boston & Lynn R. R.*, 168 Mass. 528, 47 N. E. 427; *Kuhlen v. Boston & Northern St. Ry. (Mass.)* 79 N. E. 815. It would have been error to instruct the jury as requested "that under all conditions the aisles, entrances and exits shall be kept free from all obstructions by the use of the highest possible degree of care and caution on the part of * * * street railway companies" engaged in the transportation of passengers.

In view of the conclusion to which we have come on this branch of the case it is unnecessary to consider whether there was any error in the rulings or instructions in relation to the plaintiff's due care.

There was nothing in the rule that was offered which forbade passengers to take hand bags or satchels into the cars and deposit them on the floor and it was therefore rightly excluded.

Evidence that it was customary not to have racks for baggage or parcels in street cars, and that there was a custom allowing passengers to put hand baggage and dress suit cases on the floor was admissible not for the purpose of proving a custom as such but as bearing upon the question whether the defendant exercised the degree of care required of it. *Cass v. Boston & Lowell R. R.*, 14 Allen, 448, 450; *Maynard v. Buck*, 100 Mass. 40; *Lane v. B. & A. R. R.*, 112 Mass. 455, 463. It would not follow that, if the defendant did as others did, it was necessarily exercising the degree of care required of it. The ordinary methods might be careless and therefore furnish no excuse. But it is not to be presumed that they would be, but rather the contrary. As bearing upon the defendant's case, we can have no doubt that the plaintiff would be entitled to show, if it was a fact, that it was customary to have racks in street cars for hand baggage and satchels and not to allow passengers to put them on the floor in the aisles. *Myer v. Hudson Iron Co.*, 150 Mass. 125, 138, 22 N. E. 631, 15 Am. St. Rep. 176; *Dolan v. Boott Cotton Mills*, 185 Mass. 576, 70 N. E. 1025. No good reason can be given why the defendant should not be allowed to show the converse of that proposition.

The result is that the exceptions must be overruled.

So ordered.

BOESEN v. OMAHA ST. RY. CO.

(Supreme Court of Nebraska, June 22, 1907.)

[112 N. W. Rep. 614.]

Carriers—Injury to Passenger—Contributory Negligence.*—A party cannot be charged with contributory negligence on account of taking a place on a crowded street car designated by the conductor of the car.

Trial—Instruction.—An instruction not based upon the evidence although correct as a legal proposition, is ground for the reversal of a judgment if it has a tendency to mislead the jury. *Esterly Harvesting M. Co. v. Frolkey*, 51 N. W. 594, 34 Neb. 110.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Douglas County; Estelle, Judge.

Action by John Boesen against the Omaha Street Railway Company. Judgment for defendant and plaintiff appeals. Reversed and remanded.

T. W. Blackburn and *Richard S. Horton*, for appellant.
W. J. Connell and *J. L. Webster*, for appellee.

DUFFIE, C. On a former appeal taken by the Omaha Street Railway Company the judgment was reversed and the case remanded on account of misdirection of the court. 105 N. W. 304, 4 L. R. A. (N. S.) 122. A retrial of the case resulted in a judgment for the defendant, and the plaintiff has appealed, alleging error in the instructions given by the court and in refusing instructions asked by the plaintiff. A statement of the case will be found in the opinion of Mr. Commissioner Albert on the former appeal, and the facts need not be again repeated here. It is conceded that the accident took place at what is known as the "blind switch," just north of O street, in the city of South Omaha. The evidence is undisputed that the plaintiff was standing on the running board of the rear or trailer car, and his claim is that, on reaching the blind switch, the car was derailed, throwing him to the pavement, and causing the injuries for which he brings suit. The plaintiff testified that both the motor and trailer car were crowded at the time he boarded the trailer; that the conductor in charge of the car directed him to stand upon the running board. This evidence is undisputed, and plaintiff is corroborated by other witnesses that he stood upon the running board because both the motor and trailing car were crowded with passengers. It was claimed by the defendant that plaintiff was guilty of contributory negligence in riding upon the running

*For the authorities in this series on the question whether it is contributory negligence in a passenger to board a crowded car, see foot-notes appended to *Kuhlen v. Boston & N. St. Ry. Co. (Mass.)*, 22 R. R. R. 785, 45 Am. & Eng. R. Cas., N. S., 785.

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board of the car, and this was brought to the attention of the jury by the third instruction of the court, who further said to them: "If you find from the evidence in this case that in so riding he was guilty of negligence which contributed to his injury, then the plaintiff would not be entitled to recover, and your verdict should be for the defendant." The plaintiff requested the following instruction upon that phase of the case: "You are instructed that, if the plaintiff was standing on the running board of the car at the invitation of the defendant, his standing on said running board would not itself constitute negligence on his part." We have no doubt that the plaintiff was prejudiced by the instruction given by the court, and by its refusal to give the instruction asked by the plaintiff. If a passenger, at the direction of those in charge, takes a designated place on the car of the company, he cannot be charged with negligence solely from the fact that he rode in such position. He cannot be charged with contributory negligence because of the position which he occupies at the direction and request of the company. The negligence, if any, in standing where he is directed, is the negligence of the company.

In *Spooner v. Brooklyn*, 54 N. Y. 230, 13 Am. Rep. 570, it is said: "Assuming that deceased had a right to be safely carried by appellant to the stockyards, he had a right to suppose that he would not be assigned to a place of extra hazard or peril, and that to whatever place assigned reasonable care would be exercised to protect him from injury." In *City Ry. Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883, 7 Am. St. Rep. 798, the court said: "It certainly cannot be contributory negligence that he at the invitation of the defendant exposed himself to risk or danger created by the defendant, and which he did not know and of which no warning was given. The position of this outside platform undoubtedly was attended by some risks and exposure. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing, and, had the plaintiff received his injury from such cause, it may be that negligence contributing to his injury would be imputed to him."

If the plaintiff in this case had been injured by a passing vehicle, it is possible, although we have some doubt on the proposition, that he might be charged with contributory negligence, but he certainly cannot be so charged when he occupied the place by the direction of the conductor in charge of the car if the accident occurred from the operation of the train or from defects in the car or the tracks. The ninth instruction of the court is in the following language: "You are instructed that, if you believe from the evidence that plaintiff attempted to get off the car while it was in motion and fell with his knee upon the pavement, he cannot recover in this action, and your verdict must be for the defendant." The plaintiff testified that he was thrown from

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the foot board by the car being derailed at the blind switch near O street. The witnesses Oldman, Jodeit, and Mrs. Tobin each testified that the trailer jumped the track at that point. We have searched the record in vain for any evidence tending to show that the plaintiff of his own volition got off the car while it was in motion. The instruction assumes that there was evidence to go to the jury, and submits to them a fact of which no evidence exists, and this, under the repeated holdings of this court, was error. The rule is so familiar that a citation of authorities is unnecessary. Other alleged errors need not be discussed, as the case will have to be reversed and remanded from those already noticed.

We recommend a reversal of the judgment and remanding the case for another trial.

GOOD and EPPERSON, CC., concur.

PER CURIAM. For the reason stated in the foregoing opinion, the judgment of the district court is reversed, and the case remanded for another trial.

ROBINSON v. ST. JOHNSBURY & L. C. R. Co.

(Supreme Court of Vermont, Caledonia, May 18, 1907.

[66 Atl. Rep. 814.]

Pleading—Accord and Satisfaction—Release—Double Pleas—

Where, in an action against a railroad for personal injuries through negligence, defendant alleged that plaintiff was a messenger of an express company and received his injuries in the performance of his duties; that defendant and the express company had a contract whereby defendant undertook to transport all express matter and messengers of the express company, the latter assuming all risk of accidents to the messengers, indemnifying defendant against all claims by its messengers for injuries; and that the express company, for the purpose of settling for and procuring a discharge of plaintiff's cause of action, made a payment to him that was received in full settlement of the cause of action, plaintiff executing in consideration of such payment a release of his claim under seal—the pleas are not double, the fact of satisfaction being a matter of inducement only.

Same.—When the fact relied on as a gist of the defense is but the consequence of another fact, or when one of them is a necessary or proper inducement of the other, both may be pleaded without making the plea double.

Carriers—Transportation of Express Messengers—Stipulation against Liability—Validity.*—A contract whereby a railroad company

*See foot-notes appended to *Long v. Lehigh Valley R. Co.* (C. C. A.), 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508; foot-notes appended to *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; foot-notes appended to *Shannon's Adm'r v. Chesapeake & O. R. Co.* (Va.), 19 R. R. R. 91, 42 Am. & Eng. R. Cas., N. S., 91.

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undertook to transport the express matter and messengers of an express company, the latter assuming all risk of accidents happening to its messengers and agreeing to indemnify the railroad company against all claims made by its messengers for injuries received, was valid.

Same.—An express messenger, entering the employ of an express company with knowledge of a contract between the latter and a railroad company, whereby the railroad company was to transport the express company's express matter and messengers and to indemnify the railroad company against all claims for injuries received by messengers, must be held to have assented to the contract, but such assent was not a waiver of the messenger's right to assert the liability of the railroad company for injuries resulting to him through negligence.

Release—Operation—Persons Entitled to Claim Benefit.—Where an express messenger entered the service of an express company with the knowledge of a contract between the company and the railroad, whereby the latter was to transport the company's express matter and messengers, the express company to indemnify the railroad against claims for injuries through negligence, the railroad, in an action by the messenger for injuries, was entitled to plead in bar of plaintiff's suit a discharge of the express company for the injuries received.

Carriers—Injury to Passengers.—The fact that an express messenger on entering the service of an express company had some knowledge of an arrangement with the railroad company covering his transportation did not charge him with knowledge of anything affecting his right of recovery against the railroad for injuries through negligence.

Master and Servant—Assumption of Risk.—An express messenger accepting employment from an express company requiring him to work on the railroad's trains assumed, as regards his employer, the risks incident to transportation.

Exceptions from Caledonia County Court.

Action by Charles H. Robinson against the St. Johnsbury & Lake Champlain Railroad Company. Judgment for defendant, and plaintiff excepted. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

J. P. Lawson and Dunnett & Slack, for plaintiff.

Harry Blodgett and Young & Young, for defendant.

MUNSON, J. The plaintiff sues to recover damages for injuries sustained through the negligence of the defendant while he was riding upon defendant's road. The pleas allege that the plaintiff was a messenger of the American Express Company, and that his injuries were received while he was in the performance of his duties as such messenger; that the two companies had a contract by which the defendant company undertook to transport the express matter and messengers of the express com-

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pany, and the express company, assumed all risk of accidents happening to its messengers, and indemnified the defendant company against all claims made by its messengers for injuries received; and that the express company, for the purpose of settling for and procuring a discharge of the plaintiff's cause of action, made a payment to the plaintiff, which was received in full settlement, satisfaction, and discharge of said cause of action, and that, in consideration of said payment, the plaintiff executed to the express company a release and discharge of his claim under seal. The pleas are demurred to generally, and specially for that they are double, in that they set forth an accord and satisfaction and a release under seal.

It is true that a release is a complete defense, and that a seal imports a consideration; and, if the allegation of the payment and receipt of a certain sum in satisfaction and discharge of the claim is to be treated as the pleading of an accord and satisfaction, the pleas are double. But we think the fact of satisfaction as here presented is matter of inducement only. The pleas allege that the payment was made for the purpose of procuring a discharge and was the consideration of the release given, and conclude with an averment that the causes of action set up in the declaration are the identical causes discharged by the release. The allegations are all confined to a single transaction culminating in the release, and point to the release as the defense relied upon. When the fact relied on as the gist of the defense is but the consequence of another fact, or when one of them is a necessary or a proper inducement to the other, both may be pleaded without making the plea double. Gould, Pl. (4th Ed.) c. 8, § 12; *Robinson v. Raley*, 1 Bur. 316. The facts may be multifarious; yet, if they all go to make up one entire result, and require but one answer, there is no duplicity. *Torrey v. Field*, 10 Vt. 353, 412. The facts alleged may disclose two defenses; but, if so alleged as to show that but one is relied upon, the plea will not be double. See *Raymond v. Sturges*, 23 Conn. 146. The defendant claims, in the first place, that the contract between it and the express company is a valid contract, and that the plaintiff's relations to it are such that he is bound by it. The plaintiff claims that the case is controlled in this respect by *Sprigg's Adm'r v. Rutland R. R. Co.*, 77 Vt. 347, 60 Atl. 143. It was held in that case to be against public policy for a common carrier to stipulate for indemnity against its own negligence in respect of its carriage of a passenger for hire, and that a caretaker accompanying a shipment of cattle under a contract with the railroad company, based upon the same consideration as the contract of shipment, is a passenger for hire. So the determinative inquiry here will be whether the plaintiff was a passenger for hire. The decision in *Sprigg's Adm'r v. Rutland R. R. Co.*, is in accord with the holding of the United States Supreme Court in *N. Y. Central R. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627. In *Baltimore & Ohio, etc., R. R. Co. v. Voight*,

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176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, that court, while recognizing and affirming the doctrine of the Lockwood Case, held that an express messenger, occupying an express car under a contract substantially like the one set up in these pleas, was not a passenger for hire. The plaintiff insists that the reasoning upon which the court distinguished the Voight Case from the Lockwood Case is unsound, and that this court ought not to adopt it. The discussion in the Voight Case is based upon the nature of the business done by express companies and the relations sustained by those companies to the railroad companies giving them transportation, as set forth and judicially recognized in the Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. It is said that railroad companies and express companies are both common carriers of the public, but that the railroad company does not sustain that relation to the express company; that the right of an express company to the kind of transportation afforded it depends solely upon private contract; that an express messenger receives transportation as an incident of his permanent employment by the express company, and not by virtue of any right which he or his employer is entitled to demand. Any brief summary of the opinion would be inadequate, and the case should be referred to for the full discussion. The same position has been taken by several of the state courts. *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633; *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Blank, Jr., v. Illinois Central R. R. Co.*, 182 Ill. 332, 55 N. E. 332. We are not disposed to reject the theory of the United States Supreme Court as to the relation which the companies sustain to each other; and, if we proceed upon that theory, the points of difference between the Sprigg Case and this are manifest, and of controlling significance. If the drover were not the shipper of his own cattle, but one recognized by the law as a common carrier of the cattle of others; if he provided special cars and servants of his own for the transportation and care of the cattle of all persons who desired to ship them, and had an established schedule for the regular and constant service of the cattle-owning public; if the railroad companies had yielded to him all that part of their business as common carriers of freight, and had undertaken by special contract to draw his cars, giving them the special advantages required by the nature of the business as thus established, and it were then held that the drover's servant was a passenger for hire—it could be urged with greater force that the holding should control a case like this. It is evident that an express messenger cannot be classed with the caretaker of a private shipper. He receives, holds, and delivers express matter in the performance of his employer's duty as a common carrier for the public. His business and his relations to the train service are substantially the same as those of the railroad baggage master. The two are under different employers, and doing a divided work, because in the develop-

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ment of transportation facilities a certain field of service has been divided between two classes of common carriers. We think the distinction made between the Lockwood and Voight Cases stands upon good ground, and that the same distinction should be made between the Sprigg Case and this. It follows that this case is not within the rule which forbids a railroad company to stipulate against its liability, and that the contract between the two companies is a valid one.

We are next to inquire what bearing this contract has upon the rights of the plaintiff. None of the pleas allege in terms that the plaintiff assented to the contract, and only part of them allege that he had knowledge of it. The plaintiff contends that his rights cannot be affected by an agreement to which he did not assent. But we think the plaintiff must be held to have assented to the contract when he accepted the service with knowledge of its provisions. It is not to be assumed, however, that this knowledge and assent amounted to a waiver of the plaintiff's right to assert the liability of the railroad company. There is nothing in the terms of this contract that imports a waiver of the messenger's right to compensation. In most of the cases involving contracts of this character there was a further agreement on the subject between the messenger and the express company, and the question was whether the messenger could recover notwithstanding this agreement. Here the question is whether the right of recovery has been cut off by a release, and the plaintiff's knowledge of the contract is important only for its bearing on the effect of the release. We think the defendant can plead the plaintiff's discharge of the express company in bar of the plaintiff's suit because of this contract. Under the contract the ultimate liability for any damage sustained by the plaintiff through the negligence of the defendant rested upon the express company. So payment by the express company, even if that company was in no way liable to the plaintiff, would not be payment by a stranger, but by one who had the right to pay in behalf of the defendant for its own protection. This being the situation, the action of the plaintiff in obtaining satisfaction from and discharging the express company must be held to have been taken in view of the relations subsisting between the two companies, and to have inured to the defendant's benefit. The first, third, fifth, and seventh special pleas are held sufficient on this ground.

It remains to consider the pleas which contain no averment of knowledge. It was held in *Brewer v. New York, etc., R. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, that an express messenger cannot be deprived of his remedy against the railroad company by an agreement of his employer made without his knowledge or assent. The Indiana court reviewed this case in *Pittsburg, etc., R. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503, and reached a different conclusion. It was there considered that the express company's rights upon the train were

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measured by the contract, and that the rights of the messenger could be no greater than those of the company; that the messenger could not avail himself of the right of transportation without accepting the conditions upon which it was granted; that, inasmuch as the contract was the basis of his right, it was his duty to inform himself of its terms; and that he was thus charged with knowledge of the provision limiting the railroad company's liability. We are not willing to adopt this view. It may well be said that the messenger of an express company, who rides without paying fare or having any arrangement of his own, must understand that he is carried under some arrangement between his employer and the railroad company. But it by no means follows that this charges him with the duty of inquiring what that arrangement is. He had no reason to suppose that his personal rights are involved in the doing of his employer's work in the place where his employer has put him. There is nothing connected with his presence upon the train that is inconsistent with the statute of one entitled to the benefit of the law of negligence. He is rightfully there, rendering for his employer a service from which the railroad company derives a benefit, under some contract which might as easily have provided for his transportation by an allowance to the company as by a release from liability for damages. He may well suppose that his transportation is covered by some provision which bears only upon the rights of the contracting parties. He is not called upon to inquire whether his employer, in adjusting its relations with the railroad company, has undertaken to limit his individual rights. So the understanding that there is some arrangement covering his transportation does not charge him with knowledge of anything affecting his right of recovery. It follows that the second, fourth, and sixth special pleas are not sustainable on the ground considered. The eighth, although not alleging knowledge, sets up a direct release of the defendant, and is not specially questioned.

We have taken up these questions in the order in which they are presented in defendant's brief, and have passed upon them as presented, although the disposition of other points made by the defendant may render the decision of these unnecessary. The examination of the remaining questions will require a further reference to the pleadings.

The discharge set forth in the first six special pleas is, in substance, that the plaintiff, in consideration of a sum paid him by the American Express Company, released and discharged that company from every cause of action he had against it, and particularly from a claim on account of injuries received in the accident at Greensboro. It is also alleged, in substance, that the plaintiff demanded compensation from the express company for the injuries described in the declaration before such payment was made, and that the cause of action mentioned in said release is the one declared upon. The declaration sets up an undertaking and duty of the defendant to transport the plaintiff in one of its

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cars, and a negligence in the performance thereof, causing a collision between the car in which the plaintiff was riding and another car of the defendant, whereby the plaintiff was thrown upon the floor of the car and an iron safe case upon him. The defendant claims, further, that the release to the express company discharged both companies because the two were joint tort-feasors. It is argued that it is the duty of the express company to furnish the plaintiff a safe place in which to work, and that, as the plaintiff's work was to be done in a moving car, this duty included the providing of safe transportation, so that the express company was chargeable with negligence if there was a shortage of duty in this respect on the part of the defendant. But the safe-place doctrine is not applicable when the duty of the employee requires him to work in a place which is not in the possession and control of his employer. *Channon v. Sanford Co.*, 70 Conn. 573, 40 Atl. 462, 41 L. R. A. 200, 66 Am. St. Rep. 133. The express company had no control of the tracks or trains of the defendant. In accepting an employment which required him to work on defendant's trains, the plaintiff assumed, as regards his employer, the risks incident to the transportation. It is claimed in conclusion that if the express company was not liable, or if the express company and the defendant company are not joint tort-feasors, the effect of the discharge will nevertheless be the same. This claim is based upon the theory that satisfaction is a bar, from whatever source it comes. The rule that a discharge of one discharges all, as applied to cases of joint liability, is of ancient origin and universal recognition. A few instances of its application are found in our own cases. A release to one of several joint debtors or joint trespassers is a release of all. This is upon the ground that there is one demand against all, and that that demand is satisfied. *Brown v. Marsh*, 7 Vt. 320. Full payment by one who is jointly liable with others in a discharge of all; and a release, being an instrument under seal, conclusively imports full payment. *Eastman v. Grant*, 34 Vt. 387. One injured by the concurrent negligence of two may recover against either; but can have only one satisfaction. *Dufur v. Boston & Maine R. R.*, 75 Vt. 165, 53 Atl. 1068. In the case last cited the declaration disclosed a joint liability of the defendant and one Allen, and it was pleaded that plaintiff had given Allen a release of the cause of action. It is said in the opinion: " * * * To defeat the action, the defendant must allege facts showing that it was not liable, or that it and Allen were jointly liable, and that the plaintiff released Allen from such liability. If Allen was never liable, then the release given him did not affect the defendant's liability. In that case the payment by Allen would be the act of a stranger to the cause of action." This statement in the Dufur opinion is entirely consistent with our previous cases, and with the great majority of cases decided elsewhere; for their holding is based on the relations which those connected with the affair in question sustained to the transaction and to each other,

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which impliedly excludes the act of a stranger from the scope of the decisions. But the effect of a payment by or release to a stranger has not been directly considered in this state. The statement in the Dufur Case, although the basis of the argument, was not essential to the decision. So the question presented is an open one; and, as we shall see upon further inquiry, the trend of recent decision invites a careful examination of the authorities. The inquiry will include cases of contract, as well as cases of tort, for it is held that the effect of a release is the same in both. 1 Pass. Can. 28; *Matthews v. Lawrence*, 1 Denio (N. Y.) 213, 43 Am. Dec. 665; *Turner v. Hitchcock*, 20 Iowa, 310, 323. Cases of payment, accord, and satisfaction and release are all material to the inquiry; for all are cases of satisfaction in different forms. Payment is full satisfaction, an executed accord involves the acceptance of something as satisfaction, and a release is a conclusive acknowledgment of satisfaction. Note, 100 Am. St. Rep. 391; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Eastman v. Grant*, 34 Vt. 387. It was held in *Grymes v. Blofield*, 5 Cro. Eliz. 541, that a satisfaction of the condition of a bond by a stranger to the obligation was no bar. The authority of this case was questioned by counsel in *Edgecombe v. Rodd*, 5 East, 294, but was clearly recognized by the judges, although the decision was mainly put on another ground. The case in *Croke* was followed by the Supreme Court of New York in *Clow v. Borst*, 6 Johns. (N. Y.) 37, decided in 1810, and several cases in that jurisdiction have since been disposed of on the same ground. *Matthews v. Lawrence*, 1 Denio (N. Y.) 212, 43 Am. Dec. 665; *Bleakly v. White*, 4 Paige (N. Y.) 654; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408; *Atlantic Dock Co. v. Mayor*, 53 N. Y. 64. The same view of the matter has been taken in other states. *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 296; *Armstrong v. School District*, 28 Mo. App. 169, 180; *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548; *Missouri, etc., Ry. Co. v. McWherter*, 59 Kan. 345, 53 Pac. 135; *Sieber v. Amaunson*, 78 Wis. 679, 47 N. W. 1126; *Thomas v. Central R. R. Co.*, 194 Pa. 511, 45 Atl. 344. The doctrine has been promulgated in various text-books as settled law. It is said in the American note to *Cumber v. Wane*, in 1 Smith's Lead. Cas. 325 (3d Am. Ed.), in giving the essentials of a good accord and satisfaction, that one rule, "of no great practical value, is that the matter received in satisfaction must be given by the debtor, and not by a stranger." It is said in a note to 3 Bl. Com. 16 (Shars. Ed.), that "the satisfaction should proceed from the party who wishes to avail himself of it; for, when it proceeds entirely from a stranger, it will be a nullity." The present standing on the doctrine will be seen from a reference to further cases. In *Jones v. Bradhurst*, 9 C. B. 173, the accuracy of the reports and the subject-matter of the decisions were critically examined, but without passing upon the question. In *Belsham v. Bush*, 11 C. B. 191, a payment made and received for and on account of the defendant, and afterwards

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ratified by the defendant, was held a bar. In *James v. Isaacs*, 12 C. B. 791, satisfaction from a stranger, without authority or ratification, was held insufficient. These cases were finally reviewed in *Simpson v. Eggington*, 10 Exch. 844, where it was concluded that payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, is not sufficient to discharge a debtor unless it is made by such third person "as agent for and on account of the debtor, and with his prior authority or subsequent ratification." In *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334, the court disregarded the precedents, and held that an accord and satisfaction accepted in discharge of a debt, although coming from a stranger, is available in defense of an action against the debtor. In *Wellington v. Kelly*, 84 N. Y. 547, the court referred to *Grymes v. Blofield* as a case followed in that jurisdiction and not authoritatively overruled, and said: "We need not now determine whether it should any longer be regarded as authority."

The cases cited by defendant in support of its position are *Tompkins v. Clay Hill St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Seither v. Philadelphia Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *Hubbard v. St. Louis & Meramec River R. Co.*, 173 Mo. 249, 72 S. W. 1073; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107. The first two are cases of crossing collisions between the cars of different companies. The third was a case of collision between an express delivery wagon and a street car. In these cases the injury resulted from an impact of forces controlled by two parties, and the situation afforded the basis of an honest claim against either. Neither was a stranger to the occurrence, and it could not be said without an inquiry that either was a stranger to the cause of action. These cases have generally been treated as within the joint tort-feasor doctrine, and the Pennsylvania case seems to have been so treated by the court which decided it; for it was cited in support of the defendant's contention in *Thomas v. Central R. R. Co.*, 194 Pa. 511, 45 Atl. 344, and it was nevertheless held that the court properly excluded the release of one not shown to have been liable. With these cases may be classed *Metz v. Soule*, 40 Iowa, 236, where an inmate of the state prison was injured by defective machinery furnished by the contractors entitled to his service while he was working near it, after protest, under compulsion of an agent of the state; and *Brown v. Cambridge*, 3 Allen (Mass.) 474, where a waterworks company made and left an excavation in a street which the city was bound to keep in repair. In neither case was the release a stranger to the situation that caused the accident. In this connection reference may be had to *Chapin v. Chicago, etc., R. R. Co.*, 18 Ill. App. 47, where the injury resulted from a collision between the trains of two roads, and it was considered that the question whether the companies were joint tort-feasors was not important, inasmuch as the circumstances were such that an action would have lain against either. See, also, in

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further presentation of the subject, *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Western Tube Co. v. Zang*, 85 Ill. App. 63; Kentucky, etc., *Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219; *O'Shea v. New York, etc., R. R. Co.*, 44 C. C. A. 601, 105 Fed. 559. In *Leddy v. Barney*, 139 Mass. 294, 2 N. E. 107, the remaining case cited by the defendant, the parties were fellow employees—the plaintiff as a common laborer and the defendant as superintendent—and the evidence tended to show that the plaintiff was injured in the moving of a derrick by the carelessness of the defendant. The defense was a release taken by the employer. Of the cases cited this is most like the one at bar, for in both these cases the release was, in a sense, involved in the occurrence, but was not connected with the injury. In the *Leddy Case* the release employed the defendant as superintendent, but there was no evidence tending to show that he was negligent in selecting the defendant for that position, or that the defendant was in fact incompetent. Here the express company was the occupant of the car; but, if any circumstance in the occurrence as presented permits a supposition that the plaintiff's injuries may have been due in part to the negligence of the express company, there are no allegations to give it that effect. The instructions in the *Leddy Case* made the release a bar if it were found that the payment was made in settlement of the same claim, upon a demand made by the plaintiff, and to avoid a threatened suit; and the verdict for defendant was sustained. In disposing of the case it was said that the effect of releasing a cause of action does not depend upon the validity of the claim, and that the rule that a release to one of several persons liable releases all applies to a release given to one against whom a claim is made, although he may not be in fact liable. It is doubtless true that a discharge will not be made ineffective by proof that the party procuring it was not in fact liable. But this is not equivalent to saying that the release of an entire stranger to the transaction will bar a suit against persons who are liable. One may be a stranger to the cause of action as disclosed by the pleadings or determined by the inquiry, and not be a stranger to the occurrence out of which the cause of action arises. A claim against one whose connection with the affair is such that he may be liable is not the same as a claim against one whom there is no ground for claiming to be liable, and the effect to be given to a payment in the two cases is not necessarily the same.

The defendant also cites the remark of Judge Miller in *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. Ed. 129, that "when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages." It may also be noted that in *Dufur v. Boston & Maine R. R. Co.*, before cited, it is said that the injured party can have but one satisfaction. The same statement may be found in a great number of cases which

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were reasoned out and disposed of on the joint tort-feasor doctrine, the argument and bearing of which were entirely superfluous if payment by one who is a stranger in the broader sense is a satisfaction. The explanation seems to be that payment by a stranger has not been considered a satisfaction, but a payment regarding which question of fraud, duress, voluntary payment, liability of repayment, and equitable relief might arise after suit brought or collection enforced against the one upon whom rested the duty of payment. *Bleakly v. White*, 4 Paige (N. Y.) 654; *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 296. Manifestly the effort of recent decision has been to bring the parties in these anomalous cases into the relations which have been considered necessary to support a recovery by finding in their acts certain elements not recognized by the earlier adjudications. The making of a demand is treated as giving the payor the necessary status as far as the claimant is concerned. It is considered that in acceding to the demand the payor puts himself in the position of one who is liable or who assumes to act for one liable. The pleading of the release by one subsequently sued is treated as a seasonable ratification of the settlement. If these views regarding the settlement and the parties are accepted, the satisfaction does not come from a stranger. The case of *Jackson v. Pennsylvania R. R. Co.*, 66 N. J. Law, 319, 49 Atl. 730, 55 L. R. A. 87, a case not cited by defendant, merits special attention. The facts were almost identical with those before us. The plaintiff had acknowledged the receipt from the express company of certain sums in full satisfaction and discharge of all claims for injuries received in a certain accident. There was a contract between the express company and the defendant, not disclosed to the plaintiff, by which the express company agreed to protect the defendant from all claims for damages sustained by its employees. It was considered that the payment was made for and on account of the defendant, that the settlement was recognized and adopted by the plea, and that the plaintiff was bound by the receipt and retention of the money.

Upon the case before us, the payment was made on plaintiff's demand, in settlement of the cause of action, by one who was in fact an indemnitor of the defendant, and whose act the defendant has ratified by pleading it. We hold all the pleas good on this ground. Nothing said in the previous discussion is to be taken as deciding more.

Judgment affirmed and cause remanded.

TOWN OF LUXORA *v.* JONESBORO, LAKE CITY & E. R. CO.

(Supreme Court of Arkansas, June 17, 1907.)

[103 S. W. Rep. 605.]

Municipal Corporations—Appropriation in Aid of Railroads—Validity—Ratification.—An incorporated town appropriating by ordinance money for a railroad as an inducement to it to build its road into the town, notwithstanding Const. art. 12, § 5, prohibits a town from appropriating money to any corporation, cannot by acceptance of the benefits resulting to it from a construction of the road into the town ratify the void ordinance.

Same—Recovery of Money Paid to Railroads.*—An incorporated town paying a railroad money as an inducement to it to build the road into the town may, notwithstanding the acceptance of the benefits resulting from the construction of the road, recover the money paid.

Same—Nature of Action—Legal or Equitable.—The remedy of an incorporated town seeking a recovery of money illegally paid a railroad as an inducement to it to build its road into the town is at law for the recovery of the money, and not at equity.

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Action by the town of Luxora against the Jonesboro, Lake City & Eastern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. J. Lamb, for appellant.

E. F. Brown and *W. J. Driver*, for appellee.

MCCULLOCH, J. The town council of the incorporated town of Luxora, as an inducement to the Jonesboro, Lake City & Eastern Railroad Company to build its road into the town and establish a depot therein, by ordinance appropriated the sum of \$1,000 to be paid to said company on condition that it should execute a bond as a guaranty that it would perform the conditions of said ordinance. A warrant was drawn on the treasurer of the town for said amount payable to the railroad company, the indemnity bond was executed and the money paid over to the company on the warrant, and the railroad company complied with the terms of the ordinance by building its road into the town. The town instituted this action at law to recover the money paid to the railroad company.

It must be conceded that the appropriation of money by the

*For the authorities in this series on the subject of taxation, etc., in aid of railroads, see foot-notes appended to *Arkansas Southern R. Co. v. Wilson* (La.), 23 R. R. R. 727, 46 Am. & Eng. R. Cas., N. S., 727.

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town council for the purpose named was in direct conflict with the Constitution of the state, which provides that "no county, city or town or other municipal corporation shall become a stockholder in any company, association or corporation or appropriate money for or loan its credit to any corporation, association, institution or individual. Section 5, art. 12, Const. 1874; *Russell v. Tate*, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193; *Newport v. Railway*, 58 Ark. 270, 24 S. W. 427. The ordinance was absolutely void, and could not be ratified by acceptance of benefit thereunder by the town as it was concerning a matter entirely beyond the scope of corporate power. *Newport v. Railway*, *supra*. It is only where the power is exceeded in the method of its exercise, or where the power has been exercised by some unauthorized officer or agent, that a public corporation can ratify the unauthorized act. *Book v. Polk* (Ark.) 98 S. W. 1049; *Texarkana v. Friedell* (Ark.) 102 S. W. 374; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Dillon on Mun. Corp.* (4th Ed.) § 463; 20 Am. & Eng. Ency. Law, p. 1181.

The only remaining question is whether the municipal corporation can record back the money unlawfully paid out. As we have already said, the appropriation of the money by the officers of the town was unauthorized and unlawful, and the municipality could not, and did not by acceptance of whatever benefit accrued by building the railroad into the town, ratify the act. It is not estopped to deny the validity of the appropriation of funds by its officers. That being true, there can be no principle invoked which forbids the recovery back of the money unlawfully paid out by the officers of the town and received by the railroad company. We find the law on this subject to be correctly stated in a similar case by the Supreme Court of Minnesota as follows: "As a general rule, when an individual or private corporation pays money voluntarily with full knowledge of the facts, and without fraud or mistake, it cannot be recovered back, though there was no obligation to pay. To give effect to the payment, however, it must be the act of the individual or corporation; and in this case the payment was not the act of the corporation. It had no authority to make it. No one of the officers, nor all of them together, had authority to make it. The case stands in law as it would had some person, not connected with the city government, taken the money from its treasury and paid it to defendants. It may be different in a case where the payment is for a legitimate purpose, within the power conferred on the municipal corporation, and is made by an officer or upon the direction of an officer, who has authority to determine whether some condition precedent to the authority of the paying officer to pay has been complied with. As the corporation had no authority to pay the money, the payment was not a corporate act, and consequently there is no basis for the doctrine of voluntary payment." *City of Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737.

The plaintiff's remedy at law for the recovery of the money

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illegally paid was complete, and the case should not have been transferred to equity. This was done on the defendant's motion, and over the plaintiff's objection.

Reversed and remanded, with directions to remand the case to the circuit court for further proceedings not inconsistent with this opinion.

BIRD, Atty. Gen., *v.* COMMON COUNCIL OF CITY OF DETROIT *et al.*
(Supreme Court of Michigan, April 30, 1907.)

[111 N. W. Rep. 860.]

Municipal Corporations—Streets—Improvement—Street Railways.—Neither Detroit City Charter, § 169, authorizing the city to establish, pave, repair, and otherwise improve its highways, streets, and avenues, nor Comp. Laws, § 3443, requiring the city to keep its streets "reasonably safe and convenient for public travel," authorized the city to own and lay street car tracks in streets to be leased and used by private street railway corporations for hire.

Same—Works of Internal Improvement—Parks—Sewers—Waterworks.—The construction and maintenance of parks, waterworks, sewers, and a public lighting system are not works of "internal improvement," within Const., art. 14, § 9, providing that the city shall not be a party to or interested in any work of internal improvement, nor engage in carrying on any such work, etc., such undertakings being mere contributions to the public health, safety, and welfare.

Same—Street Railways.—The construction and ownership of street railway tracks by a city in its streets to be leased for revenue to a street railway company furnishing the equipment, power, etc., constituted a work of internal improvement, in which the city was prohibited from engaging by Const., art. 14, § 9, declaring that the state shall not be a party to or interested in any work of internal improvement, etc.

Blair, Montgomery, and Moore, JJ., dissenting.

Appeal from Circuit Court, Wayne County, in Chancery; Flavius L. Brooke, Alfred J. Murphy, Morse Rohnert, George S. Hosmer, Henry A. Mandell, and Joseph W. Donovan, Judges.

Bill by John E. Bird as Attorney General, on relation of Wilbur Brotherton, against the common council of the city of Detroit and others. From a judgment for complainant, defendants appeal. Affirmed.

Argued before CARPENTER, C. J., and MCALVAY, GRANT, BLAIR, MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ.

Bowen, Douglas, Whiting & Murfin (Alexis C. Angell, J. O. Murfin, Frederick W. Whiting, of counsel), for appellee.

Timothy E. Tarsney, for appellants.

CARPENTER, C. J. This suit is brought by the Attorney Gen-

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eral of the state to prevent the city of Detroit from constructing street railway tracks in its streets. The sole question involved is this: Has the city authority to construct said tracks? In the court below a hearing was had before all the judges. They were divided in opinion; but a decree was entered granting complainant relief upon the ground that section 9 of article 14 of the Constitution prevented the building of said track. That section reads: "The state shall not be a party to or interested in any work of internal improvement; nor engage in carrying on any such work, except (in the improvement of or aiding in the improvement of wagon roads, and) in the expenditure of grants to the state of land or other property." (The above parenthesis is inserted by me for the purpose of this opinion. The clause inclosed therein is an amendment placed in the section in 1905. Prior to that time it read as it would read if the parenthetic clause were omitted.) Is this decision correct? The question involved is one of great importance. If the constitutional provision applies, the plans of that large class of people who desire our municipalities to own or operate street railways cannot be carried out under our present Constitution. If, on the other hand, the constitutional provision does not apply, there is no constitutional objection to any municipality constructing or operating street railways, and there is nothing but a possible lack of legislative authority to empower any of them to engage in that undertaking. The question of whether municipalities should own or operate street railways is a question upon which wise men differ. It is a question, too, upon which nearly every person has an opinion. That, however, is not a question submitted to us for decision. It is a question for the legislative department of government, unless the people have already determined it. The question for us is: Have the people determined it?

Complainant's counsel insist that the authority of the city to construct the track in question may be denied upon two grounds: First. Because the Legislature has never granted that authority to the city. Second. Because the constitutional provision before mentioned prevents the Legislature granting that authority and the city from exercising it. The same counsel maintain that it is our duty to deny the authority upon the first ground without considering the second. It would be our duty to do this if the two propositions presented different questions, but they do not. In determining the second (the constitutional) proposition, we decide just one question which has not already been decided by the harmonious adjudications of this court. That question is this: Has the city of Detroit authority to construct street railways under the provision of the Constitution which, by necessary implication, authorizes municipalities to construct and maintain highways for public travel? In determining the first (the construction of the legislative grant to the municipality) proposition, we decide that the city of Detroit has not authority to construct a street railway under its grant of power

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to "establish, open, widen, extend, straighten, alter * * * and to grade, pave, repair and otherwise improve its highways, streets and avenues" (section 169 of Detroit Charter), and to keep those highways, streets and avenues "reasonably safe and convenient for public travel." Section 3443, Comp. Laws 1897. Whether we are construing the legislative grant to the city or the constitutional provision above referred to, we are construing language which has the same meaning, and we reach the same question, viz.: Does the grant of authority to the municipality to construct a highway for public travel authorize it to construct thereon a street railway? I conclude, therefore, that, if we decide that the Legislature has not granted authority to defendant to construct said street railway (and the hypothesis underlying our present argument assumes that we will so decide), it logically follows that said grant was not warranted by the Constitution. In other words, it follows as a necessary consequence of an affirmance by this court of a decree of the lower court that the project of defendant to build a street railway is forbidden by our Constitution. This being so, I can see no impropriety in our so declaring in our opinion; for one of the purposes—indeed the main purpose—in writing that opinion is to enable the profession and the public to apply our decision to future controversies. If, on the other hand, we decide that authority to build a street railway cannot constitutionally be granted, no argument is necessary to prove that the city of Detroit does not possess it. It is true that in deciding the constitutional question above referred to we consider other constitutional questions, but I think it is not improper for us to do that, because those questions have, as already stated, been heretofore determined by harmonious adjudications of this court. Therefore, without undertaking to determine the construction of the legislative grant, I proceed to consider the constitutional question, viz.: Does section 9 of article 14 of our Constitution prevent our municipalities from constructing street railway tracks in their streets? I maintain that it does. Respecting this I state three propositions: First. A street railway is a work of internal improvement within the meaning of said section. Second. The prohibition of said section, unless otherwise provided in the Constitution, applies to municipalities which are subdivisions of the state as well as to the state at large. Third. No other provision of the Constitution authorizes a municipality to construct or to operate a street railway. If I am right in each of these propositions, it is clear that the city of Detroit has no authority to do the proposed work. If I am wrong in any one of them it has that authority. I proceed to consider those propositions.

First. A street railway is an internal improvement within the meaning of section 9 of article 14 of the state Constitution. This proposition is conceded by each of the counsel in this case and by each of the learned circuit judges who participated in the decision in the lower court, and by each of the justices of this

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court. But the decision of an important constitutional question should not rest upon concession alone; and therefore I support the proposition under consideration by other reasoning and authority. While it is not easy to frame a precise definition of the expression, "works of internal improvement" (this question will again be referred to), it is easy to show that a street railway is such a work. The occasion for inserting this language and accompanying prohibition in the Constitution is stated by the opinion of this court written by Justice Moore in *Attorney General v. Pingree*, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407, and it is there made clear that it was designed to cover, among other undertakings, railroads, canals, and similar works. That a street railway is a similar work, and therefore prohibited by the provision, is clear, and is shown in said opinion. It is true that in that case the scheme in question was one of operation; but that the language of the Constitution, "the state shall not be a party to or interested in any work of internal improvement, nor engage in carrying on any such work," prohibits construction as well as operation, needs no argument or authority; and, if authority be needed, it is found in *Ryerson v. Utley*, 16 Mich. 269, where the prohibited work was one of construction, and not of operation. I think this is all that is needed to be said—and perhaps more than is needed in view of the contentions of defendant—in support of the proposition that the scheme under consideration is a work of internal improvement prohibited by the Constitution.

Second. The constitutional provision in question, except as otherwise provided in the Constitution, prohibits municipalities, as well as the state at large, from engaging in works of internal improvement. In *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499, this court decided, as stated by Justice Moore in *Attorney General v. Pingree*, *supra*, "that the construction of a railroad was an internal improvement within the meaning of the Constitution, and that what the state could not do it could not authorize the townships and cities to do." The same proposition was decided in *Thomas v. City of Port Huron*, 27 Mich. 320, and *Attorney General v. Pingree*, *supra*. See, also, *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549. It is true that this proposition was denied by the Supreme Court of the United States in *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. Ed. 227, and *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008, but notwithstanding that denial this court deliberately chose, in *Dodge v. Van Buren Circuit Judge*, 118 Mich. 190, 76 N. W. 315, to stand by its position. We cannot at this day deny that proposition without overruling these decisions. Of course, we have the power to overrule them; but this power should not be exercised unless we are clearly convinced that these decisions are wrong. I, for one, am not so convinced. Study and reflection has strengthened my conviction that they were properly decided. In determining the meaning of the provision in question, we

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should remember that we are construing a Constitution. It should be given the meaning that the people intended it should have. It should be construed, if its language is appropriate, so that it will accomplish the purpose the people intended it to accomplish. What was that purpose? This cannot better be stated than by quoting the language of Justice Cooley in *People v. State Treasurer, supra*: "Our state once before had a better experience of the evils of a government connecting itself with works of internal improvement. In time of inflation and imagined prosperity the state had contracted a large debt for the construction of a system of railroads, and the people were oppressed with heavy taxation in consequence. Moreover, for a portion of this debt, they had not received what they bargained for, and they did not recognize their legal and moral obligation to pay it. The good name and frame of the state suffered in consequence. The result of it all was that a settled conviction fastened itself upon the minds of our people that works of internal improvement should be private enterprises, but that it was not within the proper province of the government to connect itself with their construction or management, and that an imperative state policy demanded that no more burden should be imposed upon the people by state authority for any such purpose." It follows that the purpose of the constitutional prohibition was to protect the people—not merely one of their governmental agencies—from the consequences (supposed evil consequences) resulting from governmental connection with the construction or management of works of internal improvement. This purpose is completely frustrated if cities, villages, and townships by authority of the central government engage in such work. In that case subdivisions of the state by authority of the state are engaged in works of internal improvement, and the evils of that engagement, if evils they are, are quite as burdensome on the people as if the central government itself had engaged in such work. To be effectual, the constitutional prohibition—and it was intended to be effectual and must be so construed—applies to every part of the state, and to me it seems absurd to suppose that the people intended to permit a part of the state to do what the whole state could not do. It is not to be supposed that the people in adopting this provision intended to prohibit the whole state from engaging in works of internal improvement and at the same time to permit any part of the state to engage in them; for, if each community can through its local government engage in such work, the consequences to the people are precisely the same as though the state engaged in it. The burden upon the people is quite as onerous and the extent of the possible undertakings is almost as great. This is shown by an illustration suggested by the present case. A similar illustration was used by Justice Moore in his opinion in *Attorney General v. Pingree*. If cities, villages, and townships may construct street railways, certainly they may construct those street

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railways which have proved to be best and most efficient, and those in rural localities at least extend through many municipalities and transport passengers and freight between distant communities. Though in such a case each municipality may for constitutional reasons other than that under consideration be prohibited from constructing or operating a road outside of its own geographical limits, the road within those limits may nevertheless be only a part of some system greater and more extensive than any dreamed of at the time our Constitution was adopted. This illustration is used, not because its magnitude determines whether a given undertaking is or is not a work of internal improvement (for the contrary is clear and is well settled; see *Hubbard v. Springwells*, 25 Mich. 153), but to show more clearly that the constitutional prohibition would become a dead letter if it has no application to municipalities. It follows from these decisions and this reasoning that the constitutional provision under consideration prohibits the state from granting to municipalities authority to engage in works of internal improvement.

It is argued, however, that, though the state cannot authorize municipalities to engage in all works of internal improvement, it can authorize them to engage in certain of said works, viz., those which are local in character. If there is any ground for this distinction, it must be found in the Constitution. If a prohibitory constitutional provision, general in its character, is subject to exceptions, those exceptions must be found in the Constitution. The courts cannot create them. They can only declare the exceptions which the Constitution itself creates. Every work of internal improvement described in the provision under consideration is prohibited, unless it is excepted by the Constitution. A municipality cannot therefore engage in any such work unless it is authorized to do so by some other provision of the Constitution. In other words, the constitutional prohibition under consideration, except as otherwise provided in the Constitution, applies to municipalities as well as to the state. In the addition to his opinion, Judge Blair contends that the constitutional provision applies to municipalities only when they are "acting as agents of and for the state." While I think this contention is answered by the foregoing reasoning, I deem it proper to add that, in my judgment, it is opposed to the decisions of *Attorney General v. Pingree*, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407, and *Bay City v. Treasurer*, 23 Mich. 499, and to the reasoning upon which those decisions are based.

It is suggested that our decisions, made before the recent amendment of 1905 permitting the state to improve or aid in the improvement of public wagon roads, holding a road for the purpose of public travel to be a work which municipalities can construct or maintain, though it is, as to the state (see *Hubbard v. Springwells*, 25 Mich. 153), a prohibited work of internal improvement, proceed upon a principle opposed to the foregoing reasoning. This I deny. On the contrary, I assert that those

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decisions afford an instance of the application of that reasoning. Municipalities could construct and maintain roads for public travel, though such roads were, prior to the recent amendment of 1905 above referred to, works of internal improvement prohibited by the Constitution, not because of any exception found outside the Constitution, but because other provisions of the Constitution (article 11, § 1. See, also, article 4, § 49; article 10, § 11) by necessary implication granted municipalities authority to construct and maintain such roads. Though cities and villages are not expressly named in the foregoing sections, I think it settled by our decisions (*Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882, and authorities there cited) that they have the same constitutional right of control over highways as are given by the above sections to the townships therein named. In the addition to his opinion, Justice Blair denies the foregoing proposition, and says: "Nowhere has the Constitution granted to cities, either expressly or by necessary implication, authority to construct or maintain highways. * * * They possess that power, if they possess it at all, because the Constitution nowhere prohibits its exercise, and the Legislature has granted it." I deem it a sufficient rejoinder to say that the right of a city to construct and maintain its highways is one of its rights of local self-government which this court has held is a constitutional right. I think this is the holding of the entire court in *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882. It is entirely consistent to say that though municipalities were prohibited by the Constitution from engaging in works of internal improvement, they might nevertheless construct and maintain roads—which are works of internal improvement—because the Constitution empowered them to do so. The constitutional prohibition was to be read as if the construction and maintenance of roads for public travel by municipalities were excepted from its operation. We may then conclude this part of the opinion by saying that, as a street railway is a work of internal improvement within the meaning of the constitutional prohibition under consideration, a municipality cannot construct it or operate it, unless authorized to do so by some other provision of the Constitution.

Third. This brings us to the third proposition in this opinion, viz., no other provision of the Constitution authorizes municipalities to construct or to operate street railways. It is contended that the constitutional grant of authority to construct and maintain roads for public travel carries as an incident thereto authority to construct street railways upon said roads. Is this contention sound? This raises the most important question in this case; and it is, as heretofore stated, the only constitutional question not heretofore determined by this court. We are not materially assisted to a correct answer of this question by determining whether or not the tracks of a street railway, after their construction, are a part of the road adapted to ordinary public travel. The question in this case is not whether municipi-

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palities can construct street railways for the purpose of being used for ordinary public travel. The bill of complainant shows that the street railways under consideration are not to be constructed for that purpose. They are, when constructed, to be used like all street railways, viz., for transporting thereon passengers for hire. While the city of Detroit does not itself propose to directly engage in such transportation business, it does propose to obtain the profits of that business. Indeed, the securing of those profits is not only an essential, but it is the essential, part of defendant's project. To sustain defendant's right to construct a street railway and to deny defendant's right to profits of the use of that railway is to give it a stone when it asks for bread. Unless a municipality can secure such profit, municipal construction of street railways would be an utter waste of public funds, and for that reason will never be undertaken and should never be permitted. If, then, there is an objection to municipalities securing the profit of transporting passengers for hire upon street railways constructed by them, that objection is fatal to the project of the city of Detroit under consideration, as well as to all similar projects of construction. Can a municipality secure the profit of transporting passengers for hire upon street railways constructed by them? If we concede its right to secure those profits, we must also concede to it the right to choose the method by which it will secure them. If it can best secure those profits by leasing said street railways, it may lease them. If it can best secure those profits by operating said railways, it may operate them. There is undoubtedly a great difference between municipal ownership and municipal operation of street railways; but there is no constitutional objection to municipal operation which does not apply to municipal ownership. If the prohibition, "The state shall not be a party to or interested in any work of internal improvement; nor engage in carrying on any such work," does not prevent a municipality constructing and leasing a street railway, it does not prevent a municipality operating said railway. Does the constitutional grant of authority to construct and maintain roads authorize a municipality to secure to itself the profits of transporting passengers for hire upon a street railway constructed on said roads? The grant of authority to construct and maintain a road is unquestionably an extensive one. It confers authority to do whatever is necessary to make and adapt that road to public travel. It cannot be claimed, however, that there passes as an incident to such grant authority to transport passengers for hire upon said road or upon any part of said road; otherwise municipalities could engage in running stage lines, omnibus lines, or hack lines upon their highways. Authority to construct and maintain highways and authority to transport passengers by hire upon said highways are in their nature and have been in practice radically distinct. The latter authority does not pass as an incident to the grant of the former. This disposes of the contention that defendant acquired power

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to execute its project as an incident to the grant of authority to construct and maintain roads; for defendant cannot execute that project—e. g., secure the profits of transporting passengers for hire upon the street railways constructed by it—without engaging directly or indirectly in the business of transporting passengers for hire. The proposition that the grant of authority to municipalities to construct and maintain highways carries the incidental authority of constructing and operating directly or indirectly street railways for the transportation of passengers for hire on said highways would defeat the purpose for which the constitutional provision prohibiting works of internal improvement was adopted. It has already been shown in this opinion that the paramount purpose of the people in adopting this provision was to prevent the government (either state or municipal) engaging itself, directly or indirectly, with schemes for transporting passengers by hire. The distinction between such undertakings and that of building roads upon which such passengers were transported was presumably as obvious then as it is now; and, when the framers of the Constitution gave to municipalities authority to construct and maintain roads, it cannot be presumed that they intended them (said municipalities) to engage in undertakings which experience had shown to be disastrous and which they intended to prohibit.

I think it may help to a clearer understanding if I state what I concede to be the essential difference between Justice Blair and myself respecting the foregoing vital question. It is this, viz.: He denies our right to consider the purpose and design of a street railway in determining whether or not its construction is a legitimate highway improvement; while, on the contrary, I affirm that we should consider its purpose and design, and that they prove that from its very inception it is not a legitimate highway improvement.

It is suggested that section 38 of article 4 of the state Constitution, authorizing the Legislature to confer upon townships and incorporated cities and villages "such powers of a local legislative and administrative character as they may deem proper" has some bearing upon the proposition under discussion. I answer this by saying: The constitutional provision that the state—and this provision, as we have seen, extends to municipalities created by the state—shall not engage in works of internal improvement is a limitation upon the authority of the Legislature when acting under this section. The Legislature, when so acting, has no more right to disregard the prohibition against internal improvements than it has to disregard the provisions securing the right of trial by jury, or any other fundamental constitutional limitation upon its authority; and this principle was recognized and applied in *Bolt v. Riordan*, 73 Mich. 508, 41 N. W. 482. I am referred to, and can find, no other provision of the Constitution which authorizes municipalities to construct or to operate street railways. I therefore conclude there is none.

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It is said that in *Detroit v. Detroit United Railway*, 133 Mich. 608, 95 N. W. 736, and later in *City of Detroit v. Detroit Railway*, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. Rep. 600, we passed this question and determined that the city of Detroit has authority to construct a street railway. In the first case it appears that the city had entered into an agreement which obligated it to maintain the pavement of a street and the foundation upon which it rested, which foundation was also the foundation upon which the track of a street railway rested. "Some spots adjacent to its [the street railway track] tracks became in bad condition, the pavement disintegrated and destroyed, and the foundation under the rails in places settled, allowing the rails to settle, due to the use of the track. The railway company having refused to repair the foundation and pavement, this [mandamus] proceeding was instituted." It was insisted that the city could not be compelled to do this work because it was a prohibited work of internal improvement under the constitutional provision in question. We decided otherwise, saying: "The street railway law does not in any way relieve the municipalities from the responsibility of maintaining the highways in a reasonably safe condition for public travel, and, as it cannot shift its liability to a railway company by contracting with it for the maintenance of the way, it would seem that it should be authorized, if it is not under legal obligation, to repair the way when out of repair, whatever the cause. * * * Street railways are adapted to aid travel in public highways, and, while the laws providing for their use impose upon private corporations the burden of constructing and operating them, all such laws contemplate that they will be constructed upon the highway. They presuppose a highway maintained by the public; and we are of the opinion that it is not beyond the authority of the public officers to build a highway that will support such traffic, even though it need a heavier pavement than ordinary traffic requires. We are also of the opinion that it cannot be said that the city engages in a work of internal improvement by making a contract whereby it shall construct and repair its highways and pavements instead of allowing the railway company to interfere with them." By this same reasoning we enforced in the second of those cases (*City of Detroit v. Detroit Railway*, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. Rep. 600) the agreement of the city to pay for constructing the concrete foundations of a street railway track on unpaved streets. It is said that we have held in these cases that a city may construct the foundations for a street car track, and that it is absurd to deny that it may construct on said foundations the tracks for which they are intended. This is plausible reasoning; but plausible reasoning is not always sound reasoning. It conveys an erroneous impression to say that we have decided that a city may construct the foundations for street railway tracks. The statement implies that we have held that it may

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construct those foundations under all circumstances. The utmost that can be said is that we have held that it may construct them under certain particular circumstances. To be exact it should be stated that we have decided that a city may construct the foundations of street railway tracks when those foundations are also the foundations upon which rests the surface of a street which it (the city) is bound to maintain in a condition reasonably safe for public travel; and we have never held that it may construct foundations whose sole function was to furnish a roadbed for the rails. In other words, we have decided that the existence of a street railway upon a street in no way impairs the right or duty of a city to keep and maintain that street in a condition reasonably safe and fit for public travel, and that it may do or contract to do whatever is necessary to be done to perform this obligation. We upheld the city's agreement in those cases to construct the foundation of a street railway, not because it was the foundation of a street railway, but because there rested upon it a surface which it (the city) was bound to maintain in proper condition for travel. We had no occasion in those cases to determine, and did not determine, the right of a municipality to construct any other part of a street railway than that which had relation to the municipal obligation to maintain a street for ordinary traffic. In those cases the question was not the one involved here, viz., can a municipality construct a street railway to be used as a street railway for the purpose of transporting passengers for hire? but it was this, viz., is the obligation of a municipality to maintain its streets in proper condition for ordinary traffic lessened by the circumstance that it rests upon a foundation which is also the foundation of a street railway? In this latter case it can very truly be said that without maintaining the foundation the city could not maintain the surface which rested upon it; that without maintaining the foundation the city could not provide a reasonably safe street for public travel; and we held, and in my judgment properly held, that this reasoning was just as applicable to an unpaved as to a paved street. Would any one venture to say that a city cannot discharge its duty of providing a safe street for ordinary public travel without putting upon that foundation a street railway track and leasing the same for the transportation of passengers for hire? That is a very different proposition. It is the proposition involved in this case; and its determination, as we have shown in this opinion, depends on very different reasoning, reasoning which results in a very different conclusion.

It is also contended that, if we deny the right of a municipality to construct a street railway system because it is a work of internal improvement, we must by the same reasoning deny its right to construct and maintain parks, waterworks, sewers, and a public lighting system. We answer this contention by saying that the right exercised in these latter instances is not prohibited by the constitutional provision under consideration. Those undertakings are not works of internal improvement within the

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meaning of the constitutional provision. One of the grounds upon which the right of a city to construct and maintain parks, waterworks, and sewers is that those undertakings contribute to the public health. Dillon on Municipal Corporations (4th Ed.) § 598. A municipality may maintain a public lighting system because it tends to the suppression of crime and the safety of travelers upon municipal highways. That there is a constitutional distinction between such undertakings and the construction of a street railway is shown by our own decisions. We have held that straightening or deepening the channel of a stream for the purpose of reclaiming submerged lands (*Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549; *Wilcox v. Paddock*, 65 Mich. 23, 31 N. W. 609), or for the purpose of improving the navigability of the stream (*Ryerson v. Utley*, 16 Mich. 269), is a work of internal improvement within the meaning of the Constitution; but, if it is straightened or deepened for the purpose of promoting public health, it is not a work of internal improvement within the meaning of the Constitution (*Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233). Undertakings in the performance of what has always been regarded as a duty owed by a government to its citizens, like that of protecting their health or suppressing crime, have never been considered and are not properly denominated works of internal improvement. In this connection it is proper to observe that the furnishing of transportation facilities has not always been regarded the duty of a government. The question naturally arises: Why is a street railway a work of internal improvement and a sewer not a work of internal improvement? While it is sufficient to show that the authorities recognize the distinction between them, it would be more satisfactory if a reason for that distinction could be pointed out. This I shall undertake to do. All will agree that at the time our Constitution was adopted, undertakings by the government to construct artificial highways of commerce or to improve natural highways of commerce were called works of internal improvement. Indeed, the expression, "Works of internal improvement," was applied to undertakings of this nature carried on by the national government very early in its history.

It is therefore clear that our Constitution was intended to and does prohibit all such undertakings (though the recent amendment excepts improvement of public wagon roads from the prohibition), and this obviously, as before stated, prohibits the construction of a street railway. If we can determine just why governmental undertakings to construct artificial highways of commerce or to improve natural highways of commerce were called works of internal improvement, we will, I think, understand why a sewer and other similar works are not works of internal improvement. I suggest that the service they render and the resulting consequence indicate why they were called works of internal improvement. Highways of commerce, whether natural or artificial, by facilitating and cheapening transportation, gave the localities through which they run material advantages

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which they did not therefore have; and this was especially true in the early days of our country. They increased the value of the land whose products they carried to market, and, as they were located within the limits of the country, they did in the broadest, though in a material, sense improve its interior. They were works of internal improvement because they improved the interior of the country. While those who advocated great national expenditures in these undertakings found legal justification therefor in the constitutional grant of authority to Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States" (Story on the Constitution [5th Ed.] § 1273), the moral justification was that they enhanced our material prosperity. Had they not in a material sense improved the country's interior, their undertaking lacked justification. They were therefore works of internal improvement. They are easily distinguished from such undertakings as the construction of parks, sewers, waterworks, and a system of public lighting. If these latter undertakings add or tend to add to the material prosperity of the community in which they are located, and doubtless they sometimes do so add, that is obviously neither the legal nor the moral purpose for which they were undertaken. Indeed, it may be said of them that if they did not in the least contribute to the improvement of the interior, and many times they do not so contribute, they would none the less be undertaken. The function of each of these latter undertakings is governmental in its character. In short, the difference between these two classes of undertakings is this, viz.: The function of one is to improve the interior, and the function of the other is not to improve the interior, but it is to perform what has always been regarded as a duty owed by the government to its citizens. Hence the one are works of internal improvement and the other are not works of internal improvement.

The eminent counsel for defendant has eloquently pictured to us the advantages which will accrue to the people of the city of Detroit if their local government is permitted to engage in this work of internal improvement—this proposed construction of a street railway. He may be right. It may be that engaging in that undertaking will be attended by no evil consequences and by great advantages to the people. That question is not for our determination. We can only say that those who adopted the Constitution, being of the opinion that the best interests of the people would thereby be promoted, prohibited such undertakings; and, so long as the Constitution contains that prohibition, we must enforce it.

I am therefore of the opinion that the city of Detroit has no authority to carry out its project of constructing a street railway.

The decree should be affirmed.

McALVAY and HOOKER, JJ., concurred with the CHIEF JUSTICE.

CITY OF HICKORY v. SOUTHERN RY.

(Supreme Court of North Carolina, Dec. 22, 1906.)

[55 S. E. Rep. 840.]

Nuisance—Injunction.—Though, in a suit to restrain a railroad from erecting a freight warehouse in a city on the ground that it would create a public nuisance by obstructing the view along the tracks and thereby make it dangerous for persons to cross the tracks, the jury found that the structure would constitute a public nuisance, the railroad should be permitted to avoid a perpetual injunction by erecting suitable gates and providing gatemen as usual and customary at dangerous crossings.

Clark, C. J., dissenting.

On rehearing.

For original opinion, see 53 S. E. 955. Decree modified.

Self & Whitener and *T. M. Hufham*, for appellant.

W. B. Rodman, for appellee.

BROWN, J. This case is reported in 141 N. C. at page 716, 53 S. E. 955. Upon careful consideration of the petition to rehear the same, we are of opinion that the decree of the superior court should be modified. The action was brought to enjoin the defendant from erecting an addition of 70 feet to its freight warehouse on its property in the city of Hickory upon the ground, as indicated by the pleadings and plaintiff's evidence, that it would create a public nuisance by obstructing the view along the railroad tracks and thereby make it dangerous for persons to cross defendant's tracks at Marshall street. The following is the material issue submitted to the jury: "Will the enlargement of defendant's present freight depot by an extension on the Eastern side thereof constitute a public nuisance? Answer: Yes." When the fact of nuisance is established by the verdict of a jury, the ordinary judgment is that the defendant be required to abate it. It is not always that the "far-reaching arm of the chancellor," the writ of injunction, will be extended even then. The general rule is that an injunction will be denied in advance of the creation of an alleged nuisance when the act complained of may or may not become a nuisance according to circumstances, or when the injury apprehended is doubtful, contingent, or eventual merely. That is the universal law in all the courts in this country. See 21 Am. & Eng. Encyc. Law (2d Ed.) 705, where the cases are collected from all the states. Mr. High also states the law to be without a discordant note, that, when the injury complained of is not an existing nuisance per se, but may or may not become so according to circumstances, and when it is uncertain, "or productive of only possible injury," equity will not interfere. In support of that he cites 30-odd cases, two being from

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this state. All the decisions in this court support the rule referred to. *Simpson v. Justice*, 43 N. C. 115; *Barnes v. Calhoun*, 37 N. C. 199; *Wilder v. Strickland*, 55 N. C. 386; *Ellison v. Commissioners*, 58 N. C. 57, 75 Am. Dec. 430; *Walton v. Mills*, 86 N. C. 280; *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704. In the latter case Chief Justice Smith says: "While it is true that a business lawful in itself may become so obnoxious to neighboring dwellings as to render their enjoyment uncomfortable, whether by smoke, noxious and offensive odors, noise, or otherwise, and justify the protecting arm of the law, yet there must be the ascertained and not probable effects apprehended. When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering." In *Barnes v. Calhoun*, *supra*, an action to restrain the erection of a mill, Gaston, J., says: "But it [a court of equity] will only act in a case of necessity when the act sought to be prevented is not merely probable but undoubted, and it will be particularly cautious thus to interfere when the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience." Mr. High, in his work on Injunctions, also says: "When an injunction is asked to restrain the construction of works of such a nature that it is impossible for the court to know until they are completed and in operation whether they will or will not constitute a nuisance, the writ will be refused in the first instance." Sections 488 and 489, note 1. It seems to us that Mr. Elliott has given us the true and just rule which should guide us in the disposition of this case, fair to plaintiff and defendant alike. He says: "Where a street is laid out across the right of way of a railway company at a point where the company has only one track, no question can justly arise as to the impairment of the company's franchise by such taking, for, under such circumstances, both the use as a highway and the use as a railroad can stand together, and do not interfere with each other." Elliott on Railroads, § 1104. The extension of defendant's warehouse and the safe use of Marshall street can easily coexist. The defendant can readily construct gates across the street for the protection of persons crossing the tracks from injury by its trains. There is no evidence that the defendant will not do this, and it can be compelled to do so by this court by order in this case. This court can direct a mandatory injunction compelling defendant to establish such gates and provide such gatemen as are usual at much frequented crossings, or it can direct that the defendant be enjoined from building the extension until it does erect such gates. It must be admitted that this will afford the most perfect relief and that conditions would be much safer than they now are or ever have been since the street was opened. We must take it as true that the record discloses the only purpose for which the suit is brought, viz., to lessen the danger to

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passengers and traffic along Marshall street. The modification of the decree affords the most perfect safety possible. It is a method of safety universal in this country. We have a direct authority in this state for such an order. *Hyatt v. Myers*, 71 N. C. 273. In that case the nuisance complained of was a steammill across the street from plaintiff's residence. The fact of an existing nuisance was established by a jury. The court, notwithstanding the verdict, declined to enjoin the defendant, but directed him, of its own motion, to raise his smokestack 20 feet and to attach spark arresters thereto, or otherwise to abate the nuisance. So, if defendant's freight station was already extended, and an existing nuisance and danger as alleged, and the fact so found, the defendant should be allowed to abate the nuisance by establishing protecting gates. It cannot abate it now because it does not exist. In *Hyatt v. Myers*, 73 N. C. 233, Chief Justice Pearson states the law to be that, even after a verdict establishing a nuisance, equity will not necessarily enjoin. The application of that remedy will always depend upon circumstances, the chief of which is, "can the trouble be otherwise remedied?" This case is cited and affirmed in *Brown v. Railroad*, 83 N. C. 130, by Judge Dillard, who holds, in substance, that equity will not enjoin, even after verdict establishing it, unless the nuisance is irreparable, or one "which cannot be otherwise relieved against." To the same effect is *Story, Eq.*, § 925; *Adams, Eq.*, 211; 3 *Dan'l, Chancery* 1587. In *Simpson v. Justice*, 43 N. C. 120, Chief Justice Pearson says that the jurisdiction of courts of equity to interfere by injunction in cases of this kind should be exercised "sparingly and with great caution." "There is," says that eminent judge, "an obvious difference between a thing which is a nuisance itself, and one which may or may not be a nuisance according to the manner in which it is used."

We therefore think it proper to direct a modification of the decree of the superior court so as to permit the defendant to remedy and guard against any possible danger to persons crossing its tracks at Marshall street by erecting suitable gates or barriers on its right of way across said street and to provide a gateman, as is usual and customary at all dangerous and much frequented railroad crossings in cities and towns. Said structure shall be such as is reasonably sufficient to afford protection to persons using said crossing from injury by passing trains and to be maintained by the defendant. Upon presenting its petition to the superior court and satisfying the judge thereof that defendant has fully complied with the decree as modified and amended, the perpetual injunction enjoining defendant from extending and enlarging its freight depot shall be vacated.

As to the other contention of defendant relating to the title to certain land, we will add nothing to what is said in the opinion at the last term. We generally affirm the judgment subject to the modification made. Let the costs of this rehearing be equally divided between plaintiffs and defendant.

Former decree modified.

RICE v. NORFOLK & W. RY. CO.

(Circuit Court of Appeals, Sixth Circuit, May 10, 1907.)

[153 Fed. Rep. 497.]

Railroads—Reorganization—Purchasing Company—Liability.*—Rev. St. Ohio 1892, § 3300, authorizes any railroad company to purchase any part or all of a railroad constructed or in course of construction by another company, if the lines are continuous or connecting and not competing, and declares that after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and shall be subject to all the "duties, obligations and restrictions" of the former company. Held, that a claim for breach of a contract to transport plaintiff's stone for a specified rate existing against a railroad company, whose line was purchased by defendant, was not an "obligation" which defendant was bound to perform under such section; defendant never having agreed to assume such liability.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

A. T. Holcomb and *Albert D. Alcorn*, for plaintiff in error.
Oscar W. Newman, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The validity of the claim sued on in this case depends upon the construction of section 3300 of the Revised Statutes of Ohio of 1892, regulating the purchase by a railroad company of a line of road of another company, continuous or connected, but not competing.

The suit was brought by the plaintiff in error, Samuel L. Rice, against the Norfolk & Western Railway Company, on a contract made by Rice with the Cincinnati, Portsmouth & Virginia Railroad Company, the predecessor of the Norfolk & Western Railway Company, by which Rice agreed to purchase and operate a stone crusher on the line of the road near Newport, Ohio, and the railroad company agreed to carry the crushed stone to points in Cincinnati, Ohio, at rates fixed by the contract. This contract was entered into on October 22, 1898. It is alleged in the petition that Rice expended \$9,390.83 in the purchase and establishment of the stone crushing plant; that for a short time the Cincinnati, Portsmouth & Virginia Railroad Company complied with the contract, but on or about April 1, 1900, without

*For the authorities in this series on the question whether the purchaser of railroad property can be held liable on account of claims against the predecessor railroad company, see foot-note appended to *Hukle v. Atchison, etc., Ry. Co. (Kan.)*, 17 R. R. R. 692, 40 Am. & Eng. R. Cas., N. S., 692; *Lincoln Tp. v. Kansas City, etc., R. Co. (Neb.)*, 20 R. R. R. 364, 43 Am. & Eng. R. Cas., N. S., 364.

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any cause, and against the protest of Rice, refused to further transport the crushed stone at the rates fixed in the contract, and demanded rates in excess thereof, which Rice was compelled to pay under protest, the overcharges amounting altogether to about \$1,110.17.

After this, on October 12, 1901, the defendant, the Norfolk & Western Railway Company, purchased the railroad property and franchises of the Cincinnati, Portsmouth & Virginia Railroad Company, including the line of road from Sciotoville to Cincinnati, Ohio, through the counties of Scioto, Adams, Brown, Clermont, and Hamilton, on which was located the stone crushing plant of Rice already mentioned.

The suit was instituted August 4, 1903, by Rice, against the Norfolk & Western Railway Company, to recover the damages, claimed to be \$10,000, caused by the breach of this stone crushing contract by the Cincinnati, Portsmouth & Virginia Railroad Company, and the overcharges, amounting to \$1,110.17, alleged to have been collected under it by the latter company.

The purchase of this railroad was made under authority of section 3300 of the Revised Statutes of Ohio of 1892, which provides:

"Any company may * * * purchase any part or all of a railroad constructed, or in course of construction, or by another company, if the lines of road of such company are continuous or connected and not competing, upon such terms as may be agreed upon between the companies; and after such purchase, the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, * * * including the power to acquire and appropriate property therefor, and shall be subject to all the duties, obligations and restrictions of said company," etc.

In the deed of conveyance of this railroad, there was included in the description of the property conveyed "all cash on hand, contracts, book accounts, bills receivable and assets of every kind," etc.

The plaintiff Rice takes the position that among the "contracts" mentioned and intended to be embraced in the deed of conveyance of the railroad property, along with "cash on hand," "book accounts," "bills receivable," and "other assets," was included his contract with the Cincinnati, Portsmouth & Virginia Railroad Company, and that section 3300 at the same time it vested in the Norfolk & Western Railway Company all the rights and powers in respect to the location, construction, completion, and operation of the railroad, and its branches, owned by the selling company, also subjected the purchasing company to all the "duties, obligations and restrictions" imposed by this stone crushing contract upon the selling company.

To determine this requires a construction of section 3300, and especially the words just quoted.

The original of section 3300 was enacted May 1, 1852, as sec-

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tion 24 of the act to provide for the creation and regulation of incorporated companies in the state of Ohio. It provided that any railroad company might aid another in the construction of its road for the purpose of forming a connection of the two roads, or might lease or purchase the road of another company, if the lines of road should be continuous or connecting, upon such terms and conditions as might be agreed upon between said companies, but no aid should be furnished or purchase perfected until the question should be submitted to and approved by the stockholders of the companies.

As thus enacted, the section came before the Supreme Court of Ohio in *Campbell v. Marietta & Cincinnati R. R. Company*, 23 Ohio St. 168, 188, in which the authority exercised in the purchase and operation by the Marietta & Cincinnati Railroad Company, of its branch line from Hampden to Portsmouth, Ohio, was in dispute. The court, speaking by Judge McIlvaine, said:

"This act is entirely silent as to the terms upon which the purchase road may be maintained and operated by the purchasing company. Indeed, it does not, in terms, authorize the purchasing company to maintain and operate the purchased road at all; but such authority must be implied from the grant of power to purchase, for the reason that the Legislature certainly did not intend that the purchased road should cease to be operated as a public highway. And inasmuch as no new mode of use or power of control was expressly provided, and as the power of the purchasing company to demand and receive tolls, as conferred by its own charter, is limited to roads constructed under the charter, it must be inferred that the Legislature intended the purchasing company to succeed to the powers and privileges of the vending company, and to none other."

The limitations which followed the powers of the purchasing company thus restricted are expressed in the second paragraph of the syllabus:

"(2) Where the railroad of one company is purchased by another railroad company, in pursuance of a statute authorizing the purchase, in the absence of any provision of law to the contrary, the road passes to the purchasing company subject to the same restrictions and limitations as to rates chargeable for transportation as attached to it in the hands of the vendor." 23 Ohio St. p. 168.

Section 24 of the act of May 1, 1852 (50 Ohio Laws, p. 281), as thus construed, was amended by the act of April 15, 1873 (70 Ohio Laws, p. 129), by the addition of certain sections defining the rights of dissenting stockholders, and passed into the Revised Statutes as section 3300, where it was amended March 14, 1882 (79 Ohio Laws, p. 35), so as to assume its following form, which has remained unchanged:

"Sec. 3300. Any company may aid another in the construction of its road, by means of subscription to the capital stock of such company, or otherwise, for the purpose of forming a connection

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of the roads of the companies, when the road of the company so aided does not and will not, when constructed, form a competing line; any company may lease or purchase any part or all of a railroad constructed, or in course of construction, by another company, if the lines of road of such companies are continuous or connected and not competing, upon such terms as may be agreed upon between the companies; and after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, and of branches thereto of the company from which it purchased said railroad, including the power to acquire and appropriate property therefor, and shall be subject to all the duties, obligations and restrictions of said company; and any two or more companies whose lines are connected and not competing, may enter into any arrangement for their common benefit consistent with and calculated to promote the objects for which they were created."

It is the contention of counsel for the defendant in error that the provision that the purchasing company "shall be subject to all the duties, obligations and restrictions of said company," referring to the selling company, is merely an expression in statutory form of the rule announced in the case of *Campbell v. Marietta & Cincinnati Railroad Company*, 23 Ohio St. 168, and relates only to the duties, obligations, and restrictions of a public nature, imposed by law, and does not embrace obligations created by contract like that entered into between Rice and the Cincinnati, Portsmouth & Virginia Railroad Company, which could have no binding force upon the purchasing company, unless a special provision was made for their continuance in the contract for the purchase of the road. This was the view taken by the court below.

It would seem to be supported by the decision in *Railroad Co. v. Hinsdale*, 45 Ohio St. 556, 557, 572, 15 N. E. 665, in which it was held that neither section 3300 nor section 3409, of the Revised Statutes of Ohio of 1892 conferred authority to sell and transfer a stock subscription made by the company whose road was purchased.

An examination of the Revised Statutes of Ohio of 1892 discloses provisions relating to the sale of railroad properties which may throw light upon the meaning of the provision under consideration.

The general rule is that the owner of property, whether an individual or a corporation, has a right to sell and dispose of it in good faith and for a valuable consideration.

"It is true that, ordinarily, a creditor has no right that will interfere with that of his debtor to sell and dispose of his property for a valuable consideration, unless he has taken the precaution to acquire some lien upon it, by mortgage or otherwise, as a security in his own behalf. As a rule, the right of an unsecured creditor is confined to the personal obligation and the undisposed

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of property of his debtor; still it is not strictly accurate to say that such creditor has no claim upon the property of his debtor, for in one sense, all the property owned by a debtor, unless exempt by statute from sale on execution, is subject to the claims of his creditors, and he cannot dispose of it unless for a valuable consideration, so as to defeat this right." *Compton v. Railroad Co.*, 45 Ohio St. 592, 614, 16 N. E. 110, 18 N. E. 380.

The above extract from the opinion of Judge Minshall, is preliminary to the holding that under the act of April 10, 1856 (1 Swan & C. Rev. St. p. 327, now section 3384 et seq., of the Revised Statutes of Ohio), the effect of the Ohio act for the consolidation of railroads was to merge the old corporations into the new one, which took their place, succeeded to their property, and assumed their liabilities. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Railway Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Wabash, etc., Ry. Co. v. Ham*, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. Ed. 235; *Compton v. Railway Co.*, 45 Ohio St. 592, 613, 16 N. E. 110, 18 N. E. 380.

The interpretation thus placed upon these Ohio statutes was the result of the express language used. The original language, preserved in section 3384, provided that upon the consolidation:

"All rights of creditors, and all liens upon the property of either of said corporations (meaning the constituent companies), shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies, shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it." *Compton v. Railway Co.*, 45 Ohio St. 613, 16 N. E. 110, 18 N. E. 380; Rev. St. Ohio 1892, § 3384.

This express provision was held not to be applicable in the case of *Railroad Co. v. Hinsdale*, 45 Ohio St. 556, 15 N. E. 665, and for lack of it neither section 3300 nor section 3409 of the Revised Statutes of 1892 was deemed to confer authority to sell and transfer the stock subscriptions of a selling company to a purchasing one.

Again, section 3396, which relates to the reorganization of railroad companies, after defining the powers of the new company, and providing that all the franchises and property of the reorganized company shall be held and disposed of for the use and benefit of the creditors and stockholders of such company, contains the following language:

"And shall be in no wise chargeable in respect to any debt, liability or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for."

Again, section 3426, which relates to the purchase of railroads at judicial sale, after providing for the incorporation of the purchasers and the transfer to them of the railroad and property purchased at the sale, contains the following language:

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"And in the operation and maintenance of such railroad, the said corporation shall be entitled to all the rights, and subject to all the privileges and restrictions imposed upon railroad companies by the general laws of this state."

This language, it seems, is a substantial equivalent for that contained in section 3300; the "duties, obligations and restrictions of said company" being those "imposed upon railroad companies by the general laws of this state."

The cases of *New Bedford R. R. Co. v. Old Colony R. R. Co.*, 120 Mass. 397, *Berry v. K. C. Ft. S. & M. R. R. Co.*, 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371, *Montgomery & West Point R. R. Co. v. Boring*, 51 Ga. 582, and *Warren v. Mobile & Montgomery R. R. Co.*, 49 Ala. 582, all turn upon statutes whose language differs materially from that of the Ohio law.

In the Massachusetts case, by a special act one railroad was authorized to "purchase the rights, franchises and property" of another, and the latter, upon such purchase, was given power to convey "its franchises and property, and all the rights, easements, privileges and powers" granted to it, to the purchasing company, which upon such conveyance, was "to have, and enjoy all the rights, powers, privileges, easements, franchises and property," of the selling company, "and be subject to all the duties, liabilities, obligations and restrictions to which said last-named corporation may be subject." The Supreme Court of Massachusetts held that this language was broad enough to place the purchasing in all respects in the position of the selling corporation, upon the making of the conveyance. "It is equivalent to an amalgamation of the two; all the franchises, privileges, and powers are transferred without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation," etc. 120 Mass. 400.

This is not true of section 3300 of the Ohio law. It does not provide for the sale of a railroad company, with all its franchises and property, but for the lease or sale of the whole or any part of a railroad constructed or in course of construction. The only franchises vested in the purchasing company are "the rights and powers in respect to the location, construction, completion and operation of such railroad." It is perfectly obvious that the lease or sale of a part of a railroad under this provision would not necessarily terminate the existence of the selling company. It might, or it might not. The reasoning of the Massachusetts case does not apply here.

The statutes on which the other cases turn present even more marked differences.

In conclusion, we may observe that the stone crushing contract

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between Rice and the Cincinnati, Portsmouth & Virginia Railroad Company terminated before the purchase of the railroad of the latter company by the Norfolk & Western Railway Company. The amended petition claims damages for its breach. This is not a claim that the contract is or was binding originally upon the purchasing company. The claim is limited to the liability on the part of the latter for the damages caused by the selling company through a breach of its own contract with Rice. But it is to be observed that there is no averment and no claim that the purchasing company agreed to assume any such liability on the part of the selling company. Nor is there any attempt to charge the purchasing company with fraud in the disposition of the assets it obtained through the purchase. That remedy, the pursuit of the assets of the selling company, would only naturally follow an attempt to collect the claim against the selling company itself.

The judgment is affirmed.

BERGER v. PENNSYLVANIA R. CO.

(Supreme Court of Rhode Island, May 28, 1906.)

[65 Atl. Rep. 261.]

Corporations—Foreign Corporations—Doing Business within the State.—A foreign railroad corporation, not owning or operating any railroad in the state, but employing an agent to solicit in the state freight for ultimate shipment over its lines wholly outside the state is not doing business within the state within Court and Practice Act 1905, p. 155, c. 29, § 526, authorizing the service of summons in actions against foreign corporations doing business in the state, and it is not subject to the jurisdiction of the courts of the state.

Action by Jacob Berger against the Pennsylvania Railroad Company. Heard on demurrer to the plea to the jurisdiction for insufficiency of the service of summons. Demurrer overruled, and the plea to the jurisdiction sustained.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Page, Page & Cushing, for plaintiff.

Tillinghast & Murdock, for defendant.

PER CURIAM. This is an action originally brought in the district court of the Sixth judicial district by Jacob Berger, a resident of Providence, state of Rhode Island, against the Pennsylvania Railroad Company, a foreign corporation having its principal office in Philadelphia, in the state of Pennsylvania, for failing to deliver, in the discharge of its obligations as common carrier, 12 bales of feathers to the plaintiff in Newark, N. J. The declaration alleges that on December 12, 1904, the plaintiff delivered

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to the New York, New Haven & Hartford Railroad Company, a corporation doing business in Rhode Island, as a common carrier of freight, 12 bales of feathers, consigned, in the bill of lading issued by the said New York, New Haven & Hartford Railroad Company, to the plaintiff at Newark, in the state of New Jersey; that the defendant, the Pennsylvania Railroad Company, a connecting carrier of and with the said New York, New Haven & Hartford Railroad Company, received the said bales of feathers from the said New York, New Haven & Hartford Railroad Company, at some point between said Providence and said Newark, and that it failed to deliver the bales in question to the plaintiff or his authorized agent. Service of the writ of summons was made by copy "at the office of the within-named defendant corporation in the hands and possession of a clerk employed by said defendant within my precinct." The defendant files a plea to the jurisdiction in which it sets forth that the defendant company, a common carrier, is a foreign corporation, having its principal office in Philadelphia in the state of Pennsylvania; that it does not own, control, or operate any line of railroad or other means of transportation in the state of Rhode Island, and that it has no means whatsoever of conducting its said business in said state of Rhode Island; that it has and does solicit, in the state of Rhode Island, freight for ultimate shipment over its lines of railway running from Jersey City in the state of New Jersey; that its district freight solicitor in the state of Rhode Island has an office at No. 4 Westminster street, in the city of Providence, over which is a sign reading "Pennsylvania Railroad Freight Agency"; that the district freight solicitor of the defendant solicits consignors of freight to have their bills of lading direct that freight for points beyond said Jersey City shall be delivered to the corporation at said Jersey City; and that consignors of freight in the state of Rhode Island receive the bill of lading of the New York, New Haven & Hartford Railroad Company.

To this plea the plaintiff demurs, and the question raised is whether or not there has been such service of legal process upon the defendant corporation as to make it answerable to the plaintiff in the courts of this state, in conformity with the provision of Court and Practice Act 1905, p. 155, c. 29, § 526, as follows: "And when a writ of summons shall be issued against a foreign corporation doing business in this state, it shall be served by leaving an attested copy thereof with any clerk or agent in this state of such corporation, or with the attorney of such corporation appointed under the law upon whom service may be made as against such corporation."

The validity of the service of the writ in this case depends upon the question whether the defendant corporation was "doing business" in this state within the meaning of section 526 of the court and practice act, the sole duty of its agent here being to solicit customers to instruct the carrier who should transport their mer-

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chandise to Jersey City to deliver their consignments there to the defendant for further transportation. We do not so interpret the statute. It cannot be said that a corporation which is merely soliciting contracts to begin and continue entirely out of this state is doing business in the state. If it were so, every corporation located outside this state which should insert in a Rhode Island newspaper an advertisement of its business would come equally within the purview of the act. It has been repeatedly said that "when service is made within the state upon an agent of a foreign corporation, it is essential in order to support the jurisdiction of the court to render a personal judgment, that it should appear * * * that the corporation is engaged in business in the state." *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222 (statute of Michigan), and cases *infra*. The mere solicitation of business by agents of a foreign corporation is not such "doing business" within the state as to subject the foreign corporation to the jurisdiction of the courts of the state in which the business is solicited. *Boardman v. S. S. McClure Co.* (C. C.) 123 Fed. 614 (statute of Minn.); *Crocker v. Muller* (Sup.) 83 N. Y. Supp. 189; *Vaughan Machine Co. v. Lighthouse* (Sup.) 71 N. Y. Supp. 799; *Hargraves Mills v. Harden* (Sup.) 56 N. Y. Supp. 937; *Cummer Lumber Co. v. As. M. F. Ins. Co.* (Sup.) 73 N. Y. Supp. 668; *Am. Contractor Pub. Co. v. Bagge* (Sup.) 91 N. Y. Supp. 73; *Harvard Co. v. Wicht* (Sup.) 91 N. Y. Supp. 48; *Milliken v. Fullerton* (Sup.) 91 N. Y. Supp. 1104; *Doe v. Springfield Boiler & Mfg. Co.*, 104 Fed. 684, 44 C. C. A. 128; *Beard v. U. & A. Pub. Co.*, 71 Ala. 60; *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543; *International Cotton Seed Oil Co. v. Wheelock*, 124 Ala. 367, 27 South. 517. The same rule has been repeatedly applied to railroad corporations, having agencies like the one in the case at bar, where the agent has no power to make contracts of any kind, but only the right to solicit business to be done entirely out of the state. *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; *Wall v. Chesapeake & Ohio Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129.

We see no reason to differ from the principles laid down in the above cases, and we find no authority cited by the plaintiff's attorney in this case which in any way impugns them.

The demurrer to the defendant's plea to the jurisdiction must be overruled. The defendant's plea to the jurisdiction is sustained, and the case is remanded to the district court of the Sixth judicial district, with direction that the same be dismissed.

JOHANSON *et al.* v. ATLANTIC CITY R. CO.

(Court of Errors and Appeals of New Jersey, Nov. 19, 1906.)

[64 Atl. Rep. 1061.]

Adverse Possession—Presumptions.—The general rule is that, where the possession of land is separated from the title, the law will not presume that the possession is adverse, but every presumption is in favor of possession in subordination to the title of the true owner.

Appeal—Review—Special Verdict.—In reviewing a judgment of the Supreme Court entered upon a special verdict, the facts stated in the verdict can alone be considered. The reviewing court may not examine the evidence to ascertain whether those facts were rightfully found.

Railroads—Right of Way—License—Parol—Revocation.—Where a railway company builds its road upon the land of another without other authority than the parol license of the owner, the latter may ordinarily revoke such parol license at any time, and bring suit to recover possession of the premises.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Alfred Johanson and Theresia Johanson against the Atlantic City Railroad Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. Willard Morgan and *Charles V. D. Joline*, for plaintiff in error.

Francis D. Weaver, for defendants in error.

HENDRICKSON, J. This writ brings up for review a judgment of the Supreme Court entered upon a special verdict returned from the Camden circuit. The action was ejectment brought by the plaintiffs to recover the possession of a strip of ground on the northerly side of Salem street between Burlington street and Broadway in Gloucester City N. J. The land of the plaintiffs abuts on the north side of Salem street, and their right to the fee extends to the center line of the street. The special verdict shows that the defendant company, in the year 1875, located its single track, narrow gauge, steam railway through the center of Salem street in front of plaintiff's land and upon and over a portion of it described in the declaration; that the defendant in the year 1885, changed its track so located to that of a broad gauge steam railway; and that, from and after the year 1875, it has continued to operate its trains daily over said tracks up to the time of the beginning of this suit in 1904. The defendant entered a plea of not guilty. The special verdict was silent as to the character of the possession of the defendant during the period of its occupation, and the court held that the presumption was, in that condition of the evidence, that the defendant's possession was permis-

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sive, not adverse, and accordingly rendered judgment for the plaintiffs.

We concur in the view thus reached by the court below. The general rule is that, where the possession of land is separated from the title, the law will not presume that the possession is adverse, but every presumption is in favor of possession in subordination to the title of the true owner. 1 Am. & Eng. Enc. of L. (2d Ed.) 889. I do not understand that counsel of defendant undertake to question the legal accuracy of the conclusion of the court below in giving effect to this presumption, but they seek to avoid the affirmance of the judgment by contending that we should look at the evidence taken at the trial to discover certain facts alleged to have been proven, but, by inadvertence, omitted from the special verdict, and to amend the special verdict if necessary in accordance therewith. But, in reviewing a judgment of the Supreme Court entered upon a special verdict, the facts stated in the verdict can alone be considered. The reviewing court may not examine the evidence to ascertain whether those facts were rightfully found. This is in accord with the general rule existing elsewhere. 29 Am. & Eng. Enc. of L. (2d Ed.) 1029, 1031. It may be observed, in passing, that, if the rule were otherwise, the evidence of consent to which we are asked to look could not have been considered by the court, for the reason that there is no legal proof of such consent before us. The defendant's witness, who was the attorney for the Gloucester Land Company, from which the plaintiff derives its title, at the time the defendant located its road, was asked if he knew whether a consent was given to the defendant by the land company to occupy their ground. He answered, "It was." He was then asked what permission was given in a deed executed at the time, or in a minute made at the time, and his answer was that he was unable to find any deed, and as to the minute, objection being made, he was not permitted to speak unless the absence of minute book was first accounted for, and the defendant rested without offering further evidence as to the minutes. In this situation, the evidence of the supposed consent of the land company had no legal efficacy whatever.

The defendant has assigned for error that the court below did not decide that, the defendant being a railroad company, having the power of eminent domain, and in possession of the land when the plaintiffs took title, the latter took title subject to the burden of the defendant's railroad, and that an action of ejectment will not lie; and this has been urged on behalf of the defendant as ground for reversal, and a large number of cases from other jurisdictions have been cited as purporting to support the doctrine here contended for. But the law has been settled to the contrary of this contention by this court in the case of *Hetfield v. Central Railroad of N. J.*, 29 N. J. Law, 571. This case was no doubt well considered, resulting, as it did, in reversing the majority decision of the Supreme Court in the same case. 29 N. J.

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Law, 206. It was held by this court in that case, Mr. Justice Elmer delivering the opinion, that an owner of land may revoke a parol license to build a railroad on his land, and may bring trespass *quare clausum fregit*. Upon the same principle an action of ejectment may be brought. The latter action was held by this court to be an appropriate one to recover the fee of a public street taken by a steam railway company subject to the public easement. *Bork v. U. N. J. Railroad & Canal Co.*, 70 N. J. Law, 268, 57 Atl. 412, 64 L. R. A. 836, 103 Am. St. Rep. 808. The case of *Hetfield v. C. R. R. of N. J.*, *supra*, has been frequently cited in this court with approval, and, since the special verdict shows no adverse possession and no pretense of license other than a parol license, we must be pardoned for failing to discuss the cases cited from other jurisdiction, upon a question so long at rest in this state. The result is that the judgment of the Supreme Court must be affirmed.

HALL v. WABASH R. CO.

(Supreme Court of Iowa, March 13, 1907.)

[10 N. W. Rep. 1039.]

Deeds—Exceptions—Railway Right of Way.—A deed excepting the part of the land occupied by a railroad right of way excepted the soil itself, and not merely the right of way.

Same—Abandonment of Right of Way—Reversion.—The exception in a deed of the part of the land occupied by a railway right of way was not repugnant to the grant, and the title to that part of the land remained in the grantor, and, on its abandonment for railway purposes, it did not revert to the grantee.

Eminent Domain—Costs—Attorney's Fees—Value.—Under Code, § 2007, authorizing the imposition of an attorney's fee against a railway company in a condemnation proceeding, where the owner is successful on appeal from an appraisal of his damages, in fixing the fee the court may hear testimony as to the value of an attorney's services.

Weaver, C. J., and McClain, J., dissenting.

Appeal from District Court, Monroe County; F. W. Eichelberger, Judge.

A condemnation proceeding instituted by the plaintiff to recover damages for the use by the defendant of an abandoned right of way. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals. Reversed.

T. B. Perry, for appellant.

Ben. McCon, *R. T. Mason*, and *Fred Townsend*, for appellee.

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SHERWIN, J. This is still another one of the series of abandoned right of way cases which have engaged the attention of this court since *Remey v. Iowa Cent. Ry. Co.*, 116 Iowa, 133, 89 N. W. 218, was submitted and decided. The fact questions, so far as the right of way and its abandonment are concerned, are practically the same as those involved in the preceding cases.

In this case, however, the right of way extends over the N. E. $\frac{1}{4}$ of section 29 and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 28, and the conveyances under which the plaintiff holds are not the same for both tracts of land. The old Iowa Central Railroad Company acquired its right of way by deeds from the then owners of the land, and these deeds were duly recorded. The deed conveying to the plaintiff the N. E. $\frac{1}{4}$ of section 29 contained no reservations or exceptions, and, as to the right of way over that land, this case is ruled by the *Remedy Case*, *supra*, and *Russell v. Iowa Central R. Co.* (Iowa) 99 N. W. 1131. The plaintiff's deed to the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 28 was from Athalia Carroll, who owned the land when the right of way was first located, and who deeded the same to the old Iowa Central Railroad Company. In her deed to the plaintiff, she excepted the land occupied by such right of way, in the following language, "excepting the part occupied by the right of way of the Iowa Central Railroad Company." This exception is clear and unequivocal, and no title to the land embraced in the right of way passed. She deeded all of the 40-acre tract, except the land occupied by such right of way. We do not see how an exception could be more definite, or how the intent of the grantor could be made plainer. The railroad company then had a recorded deed of the right of way. An exception in the grant of the right of way alone would amount to nothing, and, unless the exception in question withheld from the grant the strip of land so occupied, it is meaningless. It was the soil itself that was in terms excepted from the grant, and not merely the right of way.

The exception before us is not repugnant to the grant, and must be held valid; and, if it be valid, the title to the land occupied as right of way remained in the grantor, with the like force and effect as if no grant had been made. *Spencer v. Wabash Railroad Company* (Iowa) 109 N. W. 453; *Wiley v. Sirdorus*, 41 Iowa, 224; 4 Kent, Com. 468; *Moulton v. Trafton*, 64 Me. 218; *Marshall v. Trumbull*, 28 Conn. 183, 73 Am. Dec. 667; *Ashcroft v. Eastern R. Co.*, 126 Mass. 196, 30 Am. Rep. 672; *Allen v. Scott*, 21 Pick. (Mass.) 25, 32 Am. Dec. 238. It was therefore error for the court to instruct that the plaintiff was entitled, under his deed from Mrs. Carroll, to recover as to the 40 acres in question. *Spencer v. Wabash Railroad Co.*, *supra*.

On the trial of the appeal in the district court, the plaintiff was awarded a larger sum than had been returned by the sheriff's jury, and he thereupon filed a claim for an attorney's fee, and asked and was permitted to introduce evidence as to the value of such service. The appellant says that the attorney's fee that may

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be allowed under the statute must be determined by the court without the aid of such testimony. Code, § 2007, says that an attorney's fee, when allowed, shall be taxed by the court, and, construing the section, we have held that the fee allowed thereby is for service rendered in the appeal alone. *Wormely v. Railway Co.*, 120 Iowa, 684, 95 N. W. 203. Ordinarily, there should be no occasion for calling expert witnesses to aid the court in determining the amount that should be allowed. The trial judge generally knows as much about the value of given services as do the members of the bar; but, notwithstanding this, we are not disposed to establish an ironclad rule in these cases. We think the presiding judge should be given discretion in the matter, and, if he does not deem himself qualified to determine the question without the aid of testimony, we see no reason why it may not be taken. But, unless he desires it, the plaintiff has no right under the statute to do more than to show the service rendered on appeal. And by such service we do not mean the service only that is rendered in the actual trial of the case on appeal. It may properly include the necessary preparation for such trial.

For the reason given, there must be a reversal.

Reversed.

WEAVER, C. J. and McCLAIN, J., dissenting.

ILLINOIS CENT. R. CO. v. SHEEGOG'S ADM'R.

(Court of Appeals of Kentucky, June 20, 1907.)

[103 S. W. Rep. 323.]

Master and Servant—Injuries to Servant—Actions—Evidence.—In an action against a railroad for the death of a locomotive engineer, evidence examined, and held to warrant the refusal of a peremptory instruction for the defendant.

Death—Punitive Damages—Grounds—Gross Negligence.—Under Const., § 241, providing for a right of action for the death of a person caused by negligent or wrongful act, and the express provisions of Ky. St. 1903, c. 1, § 6, where a railroad was guilty of gross negligence in running a defectively equipped train over an unsafe track at a high rate of speed, it was proper to submit to the jury the question of punitive damages.

Removal of Causes—Proceedings—Duty of Courts.—Where a petition is filed for the removal of a case to the federal court, it is the duty of the judge of the state court to determine from the petition and record, whether or not there is presented a federal case, and, if so, he should remove it to the federal court, and that court should hear the proof on the jurisdictional facts, and determine whether the state or federal court has jurisdiction.

Statutes—Pleading Private Acts.—Civ. Code Prac., § 119, provides that, "in pleading a private statute, it shall be sufficient to refer to it

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by stating its title and the day on which it became a law." Held, that a petition for the removal of a case to the federal court was defective, which did not state the title of a private statute, nor its contents, but merely the petitioner's conclusions as to its contents.

Railroads—Leases—Liability of Lessor.—Under Const., § 203, providing that no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or lessee, contracted or incurred in the operation of the franchise, or any of its privileges, a railroad which had received a franchise from the state could not by a lease exempt itself from responsibility for the torts of itself and lessee.

Same—Liability of Lessor to Lessee's Servants.*—While the lessor of a railroad is not liable to the employees of the lessee for torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, it is liable to them for an injury resulting from the negligent omission of a duty owed to the public, such as the proper construction of the road.

Appeal from Circuit Court, Union County.

"To be officially reported."

Action by John E. Sheegog's administrator against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. D. Allen, Trabue, Doolen & Cox, J. M. Dickinson, and Lockett & Lockett, for appellant.

Hendrick Miller and P. B. Müller, for appellee.

NUNN, J. This action was instituted by the administrator of John E. Sheegog, who was killed in the derailment of an engine and train of cars on which he was engineer at the time. The Chicago, St. Louis & New Orleans Railroad Company, the owner and lessor of the road, Illinois Central Railroad Company, the lessee, and F. J. Durbin, the conductor in charge of the train, were made defendants to the action. It was alleged in the petition, in substance, that on the 7th day of May, 1903, his intestate was in the employment of the defendant, Illinois Central Railroad Company, as an engineer on one of its trains, and while in the performance of his duty, as such engineer, the train upon which he was engaged was, through the joint and gross negligence and carelessness of the three defendants herein, derailed, and his intestate thereby instantly killed. In the petition the negligence and concurrent negligence of each of the defendants is alleged with some particularity. We copy from it as follows: "At the time the defendant the Chicago, St. Louis & New Orleans Railroad Company was the owner of said roadbed, fences, right of way, trestles, and bridges where said accident happened,

*See foot-note appended to *Lewis v. Maysville & B. S. R. Co.* (Ky.), 11 R. R. R. 780, 34 Am. & Eng. R. Cas., N. S., 780; *Chicago, etc., Ry. Co. v. Hart* (Ill.), 13 R. R. R. 579, 36 Am. & Eng. R. Cas., N. S., 579.

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and the Illinois Central Railroad Company was the lessee of said railroad property and premises, and was the owner of the engines and cars, trains, and appliances by which the said intestate was killed, and was operating said road, trains, and engine, and the defendant F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter railroad company, and in charge of said train and engine and appliances, and the said intestate was required to obey, and was obeying and acting under the orders of the said defendant F. J. Durbin. The plaintiff now says that, by the negligence of both of said companies, defendants hereto, the said roadbed, rails, track, cattle guards, ties, fence, and right of way of the said railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous, and defective and improper condition, and by the negligence of the Illinois Central Railroad Company its engines and cars were knowingly allowed to be and remain in an improper, defective, and dangerous condition, and its said engine and cars to be so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road, premises, and cars of the defendants was known to the said defendants, and at the time of this said wreck and accident same were being operated in a careless manner by all of said defendants; and the said Durbin, by his negligence in running, ordering, and directing said train, contributed to the cause of said accident; and the plaintiff says that the negligence of the defendant (Chicago, St. Louis & New Orleans Railroad Company) in its maintenance of its tracks, roadbed, engine, cattle guards, rails, ties, fences, etc., as above set out, and together with the negligence of the said Illinois Central Railroad Company, in directing and permitting its engine, cars, and road to be operated while in a defective and dangerous condition, and the negligence of the said conductor, in ordering and directing the running and management of said train, and in failing to give proper directions, all together, jointly caused said wreck and killed the plaintiff's said intestate," etc. That his intestate was a young, vigorous man, an excellent locomotive engineer, intelligent, sober, industrious, of most excellent habits and prospects, and making and saving large sums of money, and, by the joint gross negligence of the defendants in thus causing his death, the plaintiff has been damaged in the sum of \$25,000. The plaintiff further alleged that his place of residence, as well as that of his intestate, to the date of his death, was in Central City, Muhlenburg county, Ky.; that the defendant Illinois Central Railroad Company was a corporation organized under the laws of the state of Illinois, and the defendant Chicago, St. Louis & New Orleans Railroad Company, was a Kentucky corporation organized under the laws of this state, and the defendant F. J. Durbin was a resident and a citizen of the state of Kentucky.

The defendant Illinois Central Railroad Company filed its petition and bond for removal of the case to the federal court, alleg-

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ing a separable controversy between it and appellee determinable between them without either of its codefendants, and alleging joinder of its codefendants in fraud of federal jurisdiction. The court refused to transfer the case. Then each of the defendants filed a separate answer, denying all material allegations of the petition. The issues being completed, a trial was had, which resulted in a verdict for appellee as against the Illinois Central Railroad Company for \$8,250, and on peremptory instructions the jury found for the other two defendants. The Illinois Central Railroad Company appeals, and assigns the following reasons for reversal: First, the admission of incompetent and the rejection of competent evidence; second, erroneous instructions to the jury; third, the refusal of the court to give a peremptory instruction to find for it; fourth, the refusal of the court to surrender jurisdiction to the federal court.

The third assignment for reversal necessitates our stating the substance of the evidence. Appellee's testimony conduces to show the following facts: The deceased was a young man, about 29 years old, sober, industrious, of good habits, strong, and in good health. That he had been following the avocation of railroad engineer for about eight years. That his run was from Central City, his home, to Paducah, Ky. That he was killed on appellant's line of road which connects with the main line at Princeton, Ky., and extends to Evanville, Ind., known as the Ohio Valley Line. The deceased had only made about two trips on this line, both at night; one about three weeks before, and the one on which he was killed. When the train reached a flag station called "Harding," in Union county, Ky., the engine struck a mule, turned over, and the deceased was instantly killed. No one lived at this station. A public road passed by it, crossing the railroad at right angles. From this public road running south, the way the train was going, a distance of about 150 or 200 yards to a culvert, the road is fenced on either side; but there were no cattle guards at the public road, and loose stock, according to the evidence, passes into this cul-de-sac, and grazed on either side of the track. The proof shows that this mule came upon the track in front of the engine, and made a few jumps south, and then was struck by the engine and cut in two, leaving the front part on the left of the track between the ends of two ties. From the point the evidences of the small wheels that support the pilot were noticed on the ties for 15 or 20 feet, and from that point the large drive wheels of the engine were thrown from the rails, and from that point to 20 or 30 feet beyond the culvert the ties, rails, and everything were swept clean. The proof shows that the engine was fitted with a stub pilot, instead of with a standard pilot; that the stub pilot stood four or more inches above the rails, and had but the slightest slant; that the standard pilot was very slanting, extended out in front of the engine four or five feet, and rested only two inches above the rails; and that, with it in use, when the track is properly con-

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structed and reasonably well ballasted, it was almost impossible for stock when struck to get under the train—the pilot would knock them off. The testimony showed, without much contradiction, that the portion of the track described had never been ballasted; that the ties were laid on dirt; that much of it had been washed away, so that it did not come to the top of the ties; that a track is properly ballasted when crushed stone, gravel, or cinders are tamped under, upon, and between the ties, and up to a point about even with the top of the rails (and such was the condition of the track at each end of this cul-de-sac); and that this track as constructed left about 14 or 16 inches from this stub pilot to the dirt between the ties, which made the chances of clearing the track of stock when struck by the pilot doubtful. It was proven by some of the section hands on the road that this part of the track had been in that condition for a long time, and the general superintendent of the road had had his attention called to it, and had been requested to furnish material to put that part of the road in reasonably safe condition, but had failed to do so up to the time of the accident. They also stated that the track as laid would often get out of alignment, and that they were compelled, by the use of jackscrews, to force it back. Many witnesses testified that they had been at this point when trains passed, and saw that the track was insecure; that engines and cars would wobble in passing over it, would sink in some places, and rise in others, would mash some ties down, and water and mud would gush up over them; and when trains had passed, the rails would straighten and raise some of the ties two inches from the earth. Many witnesses examined the conditions there after the wreck, and about all of them testified that there were many rotten ties. Some of them stated that more than one-half were rotten, that some of them had rotted into two pieces, and so rotten that they could pull the spikes from them with their fingers.

The most serious complaint made by appellant to the instructions is that the court gave an instruction on punitive damages. Section 241 of the Constitution, and section 6 of the Kentucky Statutes of 1903 provide that, whenever the death of a person results from an injury inflicted by negligence, damages may be recovered for such death; and, when the negligence is gross, punitive damages may be recovered. It is certain from the evidence that those in charge of the railroad knew of its defective condition; and it was gross negligence on appellant's part to direct or suffer its trains to be run from 20 to 30 miles an hour at this point, knowing also that they had failed to put cattle guards at the public crossing, and that stock might be expected in this cul-de-sac at any time. Appellant's conduct in this evidenced a reckless disregard of the rights and safety of those whose business required them to travel over this road. There were no errors in the instructions prejudicial to the substantial rights of appellant; nor did the court commit any prejudicial error in the admission or rejection of evidence.

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The main contention of appellant is that the court erred in refusing to surrender jurisdiction to the federal court. There is no question but that the petition of appellee, the administrator of deceased, stated a joint cause of action against all three of the defendants. This is conceded. Upon the filing of the petition by appellant for removal of the case to the federal court, it was the duty of the judge of the state court to determine from the petition and record whether or not there was presented a federal case; if so, it was his duty to proceed no further, but to remove the case to the federal court, and it was the duty of that court to hear the proof on the jurisdictional facts, or questions raised by the petition for removal, and determine whether the federal court or state court had jurisdiction of the case. In the case of *Crehore v. Ohio & Mississippi Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144, the court, Justice Harlan delivering the opinion, said: "If the case be not removed, the jurisdiction of the state court remains unaffected, and, under the act of Congress, the jurisdiction of the federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal." In the same opinion the court further said: "It thus appears that a case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;' and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court'"—meaning the federal court. See the following cases, which announce the same rule: *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 183, 24 L. Ed. 427; *Powers v. Railroad Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. And the following decisions of this state recognizing the same rule: *McCabe's Adm'r v. Maysville & Big Sandy Railroad Co.*, 112 Ky. 861, 66 S. W. 1054; *Rutherford v. Illinois Central Railroad Co.*, 85 S. W. 199, 27 Ky. Law Rep. 397; and *Illinois Central Railroad Co. v. Jones*, 80 S. W. 484, 26 Ky. Law Rep. 31. In this last case the court said: "If both the state and federal courts could try the same facts as to jurisdiction, different conclusions might be reached, and unseemly conflict and confusions result. To avoid these, the Congress has wisely made the condition of the federal court's jurisdiction to depend upon the filing in the state court in due time of a petition, in which, according to the unbroken current of the decisions of the federal courts construing the act, all necessary facts to show *prima facie* a right in the petitioner for the removal must be set out; not as conclusions of law, or

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such necessary facts must affirmatively and explicitly appear elsewhere in the record when the application to the state court for the removal is made. *Crehore v. Ohio R. R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Freeman v. Butler* (C. C.) 39 Fed. 1 (opinion by Barr, District Judge); *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249; *Smith v. Horton* (C. C.) 7 Fed. 270; *Amory v. Amory*, 95 U. S. 186, 24 L. Ed. 428; *Weed Sewing Machine Co. v. Smith*, 71 Ill. 204; *Chester v. Chester* (C. C.) 7 Fed. 1; *Burlington, etc., Ry. Co. v. Dunn*, 122 U. S. 517, 7 Sup. Ct. 1262, 30 L. Ed. 1159; *Railway Co. v. Ramsey*, 22 Wall. (U. S.) 322, 22 L. Ed. 823; *Grace v. Am. Central Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Gold W. & W. Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Yulee v. Vose*, 99 U. S. 539, 25 L. Ed. 355. The truthfulness of these facts may then, and not till then, be inquired into in the federal court. As the petition for the removal and the record in this case did not in our opinion state facts sufficient to confer jurisdiction upon the United States Circuit Court, that tribunal had not the right to inquire into their truthfulness, nor to hear evidence to the other facts not alleged in the record or the petition for removal, and by adding such evidence to the insufficient allegations find the needed jurisdictional facts."

The question now for consideration is: Did the court err in refusing a removal of the case to the federal court? As stated, it is conceded that a joint cause of action was alleged in the petition of appellant against all three of the defendants. The common-law distinction between different forms of action has been abolished by our Code of Practice, and all persons who are liable for a wrong may now be sued jointly in this state in an action to recover for negligence. See *McCabe's Adm'r v. Maysville & Big Sandy Railroad Co.*, *supra*. The petition for removal denies the negligence charged in the petition. This is not a jurisdictional fact under all the authorities. In an attempt to show that the Chicago, St. Louis & New Orleans Railroad Company was joined as defendant with it wrongfully, it was alleged in the petition for removal that the Chicago, St. Louis & New Orleans Railroad Company was empowered to construct and lease to the petitioner its railroad mentioned in plaintiff's petition; and stated that it was so empowered by an act of the General Assembly of the commonwealth of Kentucky, long prior to the adoption of the present Constitution of the commonwealth of Kentucky, which act of the General Assembly became a law on the 24th day of February, 1882; and that, pursuant to such powers, the Chicago, St. Louis & New Orleans Railroad Company, being the owner, leased to the petitioner all of the railroad mentioned in the petition, and parted with all dominion over it; and that your petitioner has since the lease (1897) continuously operated the railroad exclusively, and the lessor never at

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any time operated it. Even if this plea could be made available, the petition was defective; it was an attempt to plead a private statute. Section 119 of our Civil Code of Practice provides: "In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law." The title of the act is not stated in the petition, nor is there any attempt to state it. The contents of the acts is not stated. The petitioner only alleged its conclusions as to the contents, which were that the Chicago, St. Louis & New Orleans Railroad Company had the power to construct and lease to the petitioner the railroad. The same remarks will apply to the alleged contract of lease, the contents of which is not stated in the petition, nor a copy filed. The conclusion was that the lease gave it dominion over the road and under same it operated the road. It is admitted that the Chicago, St. Louis & New Orleans Railroad Company was and is the owner of the road, that it still maintains its corporate organization and existence, but, instead of operating the road itself directly, has bargained with the Illinois Central Railroad Company to run it for a compensation, as we must suppose, as the terms of the lease are not stated in the petition for removal. Even if the act and the lease had not been defectively pleaded, the result would be the same. The Chicago, St. Louis & New Orleans Railroad Company was given a franchise by the state, and it therefore assumed certain burdens, and, under the Constitution and laws of this state, it cannot by a lease exempt itself from responsibility for the torts of itself and lessee. In the case of *Lee v. Southern Pacific R. R. Co.*, 47 Pac. 932, 116 Cal. 97, 38 L. R. A. 71, 58 Am. St. Rep. 140, the court said: "Where a statute authorizing leases contains no clause exempting in any respect the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses," etc. Section 203 of the state Constitution is in these words:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges." The court in construing this section of the Constitution, in the case of *McCabe's Adm'r v. Maysville & Big Sandy R. R. Co.*, *supra*, said: "The franchises of a corporation are its property. The declaration that these, in case of a lease or alienation, shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability, for its existence is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can exempt it from liability for the wrongs of the lessee. If the

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lease in question was made after the adoption of the Constitution, it would not exempt the lessor from liability; * * * but, if it was made before the adoption of the Constitution, the result is the same." In the same case, the court again said: "The defendant company, therefore, in reality still enjoys the benefits of its charter, and cannot be permitted to escape its corresponding obligations. * * * A grant to a corporation of a right to lay out, construct, and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the power of sovereignty for the purpose of making pecuniary profit to itself. This is its franchise. Such grants are never made, except at the request of the corporation. In return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right, in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promises, except by an act of the Legislature to that effect, so distinct and unequivocal as not to be open to mistake. 'Nothing should be left to inference. * * * The sanction of the Legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. It was under a positive duty and obligation to the public, and the consent of the Legislature to the making of the lease did not imply a discharge from the duty and obligation. * * * Where a corporation seeks to escape from the burden imposed upon it by the Legislature, clear evidence of a legislative assent to such exoneration should be found.'"

It will be seen from the petition of removal that there is no allegation that the act authorizing the lease even attempted to relieve the lessor from its primary responsibility to the public; and the court in the McCabe Case, continuing, said: "After conferring upon a corporation the right of eminent domain, with many other special privileges which the Legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the state cannot be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs and defaults.' See, to the same effect, *Balsley v. Railroad Co.*, 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; *Singleton v. Southwestern R. R.*, 70 Ga. 464, 48 Am. Rep. 576; *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. 111; *Railroad Co. v. Morris*, 68 Tex. 59, 3 S. W. 457; *Chollette v. Railroad Co.*, 26 Neb. 169, 41 N. W. 1106, 4 L. R.

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A. 135; *Parr v. Railroad Co.*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Stephens v. Railroad Co.*, 36 Iowa, 327; *Bower v. Railroad Co.*, 42 Iowa, 546; *Railroad Co. v. Lee*, 71 Tex. 538, 9 S. W. 604. * * * If it be true, as the decisions with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public, unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except, perhaps, where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of the railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its tracks and station houses in safe condition? In truth, we do not know of any duties of a railway corporation which are of a private character. * * * By its acceptance of the franchise conferred by the state, the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents, for such grants are strictly construed, and, as against the public, are never extended by any construction. In the case before us, there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the Legislature had in mind authorizing the company to divest itself of its franchise, or permitting it, while enjoying them or their fruits, to be acquitted of responsibility for their abuse, without regard to the financial liability of the lessee or his amenability to suit."

But it is said that this responsibility of the lessor does not apply to the employees of the lessee of the road, that the lessor owed no duty to them, and that they are not members of the public in the sense used in the decisions on that subject. It is true that the courts in part have made this distinction, but have only extended the rule and exempted the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, but hold the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc. In the case of *Swice's Adm'r v. Maysville & B. S. Ry. Co.*, 116 Ky. 253, 75 S. W. 278, this distinction was recognized to be the true rule.

The case of *Charles A. Lee v. Southern Pacific Railroad Company*, 47 Pac. 932, 116 Cal. 97, 38 L. R. A. 71, 58 Am. St. Rep. 140, appears to have been well considered, and the authorities

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carefully collated. In that opinion the court said: "In *Nugent v. Boston, C. & W. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language: 'Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility.' In *Arrowsmith v. Nashville & D. R. Co.* (C. C.) 57 Fed. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict. An analysis of the case of *East Line & R. R. Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employee of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company. The court held, and very properly, that such an action would not lie against the lessor company, and said: 'It may be that if the injury had occurred by reason of a defect in the road-bed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable; but if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road.' In all cases where a valid lease is found (or, as in this discussion where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of relationship of employer and employee under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this re-

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lationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employee of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employee of the operating company by reason of the negligence of a fellow servant, or of want and care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But where injury has resulted to an employee of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employee may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employee and employer, or any relation of contractual privity, exists. As is said in *Nugent v. Boston & M. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, where the brakeman of the lessee road was injured by reason of the defective construction of the station house by the charter company: 'Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station house of the defendant which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor.' So, here, the charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and tracks of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it."

This case is very similar to the one at bar, in which it was alleged and proven that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed. In the cases of the *Illinois Central R. R. Co. v. Coley*, 89 S. W. 234, 1 L. R. A. (N. S.) 370, 28 Ky. Law Rep. 336; *Dudley v. Illinois Central R. R. Co.*, 96 S. W. 835, 29 Ky. Law Rep. 1029, and *P. A. Underwood's Adm'r v. Illinois Central R. R. Co.*, 103 S. W. 322, delivered June 14, 1907, this court recognized the rule to be that, although the petition for removal of the case failed to allege any jurisdictional facts which would authorize the removal of the case, yet, if on the trial it is developed that the plaintiff in the action had not reasons for believing that the resident defendants in the action were responsible to him, in damages, and it is made evident

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that their joinder as defendants with the nonresident was made for the purpose of depriving the federal court of jurisdiction to try the case, then this court will reverse and remand, with directions to the lower court to remove the case to the federal court; but the case at bar does not come within this principle. The appellee not only had reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it. At the close of the evidence, and when the court gave peremptory instructions in behalf of the resident corporation and F. J. Durbin, appellant, Illinois Central Railroad Company again filed its petition and bond, and asked for a removal of the case to the federal court, which motion the court overruled, and in our opinion properly. Instead of the evidence showing an improper joinder of defendants, it made it plain that the joinder was proper.

For these reasons the judgment of the lower court is affirmed.

MCCARTHY v. PENNSYLVANIA R. Co.

(Court of Appeals of New York, June 14, 1907.)

[81 N. E. Rep. 770.]

Master and Servant—Railroads—Operation—Rules—Disuse.*—

Where a railroad train master held a school of instruction for the education of employees in the rules of the road, and train crews were there directed to take the local operator's word as to the movement of trains, which direction had continued in force for four years, it was sufficient to constitute a general custom superseding a rule requiring all orders respecting the movements of trains to be in writing.

Same—Collision—Death of Fireman—Safe Place.†—Where defendant's train dispatcher issued a train order directing the engineer of a north-bound train running on a single track to assume the right of way over another designated train, without referring to the fourth section of a south-bound train of which the north-bound crew had no knowledge, and the engineer on applying to the operator from whom he received the orders was directed to proceed, that everything was all right, and he did so, and collided with the fourth section of such south-bound train, defendant, through its train dispatcher, was negligent in the performance of the nondelegable duty to provide a reasonably safe way for the operation of such trains, and was liable for the death of the fireman of the north-bound train in the collision.

*For the authorities in this series on the subject of waiver of rules made for the guidance and protection of railroad employees, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Caraway* (Ark.), 22 R. R. R. 532, 45 Am. & Eng. R. Cas., N. S., 532; *Massell v. Boston Elev. Ry. Co.* (Mass.), 21 R. R. R. 57, 44 Am. & Eng. R. Cas., N. S., 57; *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 382, 43 Am. & Eng. R. Cas., N. S., 382.

†See foot-notes appended to *Cincinnati, etc., Ry. Co. v. Curd* (Ky.), 22 R. R. R. 69, 45 Am. & Eng. R. Cas., N. S., 69.

McCarthy v. Pennsylvania R. Co

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Daniel F. McCarthy, as administrator of the estate of Andrew F. McCarthy, deceased, against the Pennsylvania Railroad Company. From a judgment of the Appellate Division, Fourth Department (101 N. Y. Supp. 1129), overruling plaintiff's exceptions, denying his motion for a new trial, and ordering judgment for defendant on the verdict, plaintiff appeals. Reversed, and new trial granted.

The plaintiff's intestate, a fireman upon one of defendant's locomotive engines, was killed in a "head-on" collision, which occurred on the defendant's railroad between Delevan and Lime Lake on the 25th day of July, 1904. The defendant's railroad has its northerly terminus at Buffalo, and runs thence in a southerly direction through various towns and villages in this state to the city of Olean, and from thence into the state of Pennsylvania. Beginning with Protection on the north, and going south, the various stations which are within the zone of this controversy are Chaffee, Arcade, Delevan, Lime Lake, Machias, Franklinville, Cadiz, Ischua, Hinsdale, and Olean. This stretch of railroad consists of a single-track line, except at Buffalo for a distance to the south and at Olean for a distance to the north, where there are double tracks, and between these termini there are various sidings. The defendant, prior to July 25, 1904, had adopted and promulgated rules for the running of its trains, and those which are material to the issue at bar were as follows:

"500. Special orders, directing movements varying from, or additional to, the time-table, will be issued by the authority and over the signature of the superintendent. They are not to be used for movements that can be provided for by rule or time-table. They must not contain information or instructions not essentially a part of them.

"501. Each order must be given in the same words to all persons or trains directly affected by it, so that each shall have a duplicate of what is given to the others. Preferably an order should include but one specific movement."

"503. Orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, and also to a person acting as pilot. A copy for each person addressed must be supplied by the operator.

"504. Each order must be written in full in a book provided for the purpose at the superintendent's office; and with it must be recorded the names of trainmen and others who have signed for the order, the time and signals showing when and from what offices the order and responses were transmitted and the train despatcher's initials. These records must be made at once on the original copy, and not afterward from memory or memoranda."

"525. Operators will promptly record and report to the super-

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intendent the time of departure of all trains, and the directions in which extra trains are moving. They will record the time of arrival of trains, and report it when so directed."

"26. Green signifies caution, and is a signal to go slowly."

"36. Two green flags by day and two green lights by night, displayed in the places provided for that purpose on the front of an engine, denote that the train is followed by another train running on the same schedule, and entitled to the same time-table rights as the train carrying the signals."

"112. When signals displayed for a following train on single track are taken down at any point before the following train arrives, the conductor must inform the superintendent promptly by telegraph, and also the operator or switchman; and the latter, unless there is some other provision for the purpose, must notify all opposing trains of the same or inferior class leaving that point before the train arrives for which signals were displayed."

"109. All messages or orders respecting the movements of trains or the conditions of track or bridges must be in writing."

"218. Train dispatchers report to and receive their instructions from the superintendent. It is their duty to issue telegraphic orders for the movement of trains in the name of the superintendent; see that they are transmitted and recorded in the manner prescribed; and have a record kept showing the time each train passes each telegraph office."

"217. Train masters report to and receive instructions from the superintendent. It is their duty to take charge of the movement of the traffic; exercise supervision over the men employed on the trains; see that they understand and observe the rules, and suspend them when necessary for neglect of duty; * * * and see that proper precautions are taken to ensure the safety of trains and property."

Further facts appear in the opinion.

George E. Spring and *James T. Ward*, for appellant.

Frank Rumsey, for respondent.

WERNER, J. (after stating the facts). As indicated in the foregoing recital of facts, this action is brought to recover damages for the death of an employee, alleged to have been caused by the negligence of the defendant, employer. The specific charge of negligence, stated in various forms in the complaint, is that the defendant omitted to adopt, promulgate, and enforce proper rules, regulations and precautions for the operations of its trains, and that in consequence of this neglect of duty the collision occurred which resulted in the death of plaintiff's intestate. The learned court at Trial Term directed a verdict for the defendant, upon the theory that the death of plaintiff's intestate was caused by the negligence of a co-employee, and ordered plaintiff's exceptions to be heard at the Appellate Division. In that tribunal the plaintiff's exceptions were overruled by a divided court, and from the judgment entered upon that decision the plaintiff has appealed to this court.

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This case belongs to a class of cases governed by principles of law that have become axiomatic. The difficulties which beset the courts in the disposition of such cases are, not in the law, but in its adaptation to the endless variety of facts to which the law must be applied. In every such case the plaintiff comes into court invoking the rule that it is the master's duty to exercise reasonable care to provide his servant with a safe place in which to work, with proper tools and appliances with which to work, with competent fellow servants with whom to work, and with such rules and regulations as are needful for the proper control of these various agencies; and in every such case the plaintiff is met with the defendant's assertion of the rule that a servant assumes all the risks of his employment, which are as obvious to him as they are to the master, as well as all other risks which are necessarily incident to his employment after the master has fulfilled all the obligations imposed upon him by law. In the case at bar the plaintiff predicates his right to recover upon the defendant's failure to adopt and enforce proper precautions for the safety of its trains and those employed upon them. The defendant asserts its right to judgment upon the plea that it had done all that was required of it in that behalf, and that the death of plaintiff's intestate was due to the negligence of his co-employees in failing to observe and obey the rules under which its trains should have been operated. A clear understanding and correct decision of the issue thus framed requires a minute statement of some further facts.

Train No. 156 was one of the defendant's regular freight trains of the third class, which, on the day of the accident, was running southerly in four sections from Buffalo, which is designated as "GD Tower," to Olean which is called "AD Tower." Train 6,324 was an extra freight, upon which plaintiff's intestate was fireman, running northerly from "AD Tower" (Olean to "GD Tower" (Buffalo), under a general order to run ahead of third class trains going in the same direction. The movements of the first section of train 156 are not referred to in the record, because that section had no relation whatever to the collision in which the plaintiff's intestate lost his life. The only mention of the second section of train 156 is that contained in an order from defendant's train dispatcher, which was received at Hinsdale by the conductor and engineman of the north-bound extra No. 6,324 to meet at Ischua, which is the first station north of Olean. The southbound second section of 156 and the north-bound extra 6,324 having met at Ischua, the latter proceeded on to Cadiz, where it received "Order 28," directing that "extra 6,324 has right of track against third 156 Cadiz to Machias." Pursuant to this order, the extra proceeded north to Machias, arriving there at 7:20 a. m. Prior to that time, however, an order had been sent out from the dispatcher's office, which was delivered to the conductor and engineman of the third section of 156 at Arcade, the third station north of Machias, stating that "Engines

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1,884 and 1,863 are annulled as third and fourth sections 156 from Machias. Engine 1,863 will run as third 156 Machias to AD Tower." Thereupon the third section of 156 proceeded southerly to Lime Lake, which is the first station north of Machias, and there left its cars upon the siding; the engine going south to Machias, where it arrived at 6:10 a. m. and immediately turned about to go back to Buffalo. After the north-bound extra reached Machias, the engineer of that train went to the window of the telegraph operator's office and asked for orders. The operator was just receiving an order (No. 42) directing the engine released from the third section of 156 to meet south-bound train No. 150 at Protection, and announcing that "Extra 6,324 has right of track against No. 150 Machias to Arcade." The engineer of extra 6,324, having learned that section 3 of train 156 had arrived at Machias and returned to Buffalo, and perceiving that he had no further order against it, received order No. 42 and, after reading it, asked Connors, the day operator at Machias, if the third 156 had been there, and Connors replied: "Everything is all right. Go ahead." The engineer then asked Connors if the third 156 carried signals, to which the latter again replied: "Everything is all right, to go ahead." Upon this information the extra train 6,324 proceeded northerly, arriving at Lime Lake, the first station north of Machias, where the semaphore was down, which indicated that the block was clear, and that the train had the right to proceed. It went on for some distance to a point between Lime Lake and Delevan, where it collided with the fourth section of train 156, as above stated. No bulletin had been sent from the train dispatcher's office to advise any opposing train of the movements of section 4 of train 156, and the crew of extra 6,324 were ignorant of its existence.

A brief analysis of the situation disclosed by the foregoing facts will reveal the point at which we think the defendant failed to do all that the law required of it. Train No. 156 was being run in four sections. To insure the safety of opposing trains, it was therefore necessary to advise the latter of the movements of any one of these sections running in the same territory and on the same time schedule. We do not know, and are not concerned with, what was done with the first section of train 156, for that had passed from the zone between Olean and Buffalo before the extra 6,324 had arrived upon it. All that we know of the second section of train 156 is that the crew of extra 6,324 were notified at Hinsdale to meet it at Ischua, and there they met. Presumably the second section carried the green signals, which were a warning that there was another section to follow; but whether that is so or not is immaterial, since it appears that at Cadiz the extra 6,324 received orders that it had the right of way from that station to Machias as against section 3 of train 156. When the extra arrived at Machias, it had met and passed section 2, and expected to meet section 3; but the latter had been annulled, and the engine had returned to Buffalo. It is true that

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the fourth section was to run as the third section from Machias to Olean, but where it was, and what its movements were to be after the extra 6,324 reached Machias, was known only to those in control of the movements of defendant's trains at the train dispatcher's office. There were only two methods by which the engineer and conductor of extra No. 6,324 could have been advised at Machias of the movements of section 4 of train No. 156. One was by a direct order to be delivered to them, and the other was by an order to the local operator which could have been communicated to them at Machias. The defendant's train dispatcher, who concededly represented the defendant, did neither of these things, but contented himself with stating the bare fact that extra No. 6,324 would have the right of way against train No. 150 Machias to Arcade. This was either the equivalent of a statement that there would be no opposing train to look out for except 150; or it was so equivocal in its terms as to give the crew of extra 6,324 no clear idea of what they were to do. If the former view is taken of order No. 42, it would seem that the engineer of extra No. 6,324 clearly had the right to proceed without further inquiry; and, if the order is capable of the latter construction, the engineer did just what he says the train master instructed him to do in such an emergency, namely, to take the local operator's word as to the movement of trains. In either event the result is to make the sufficiency of the defendant's rules a question of fact for the arbitrament of a jury, rather than a question of law for the decision of a court.

Counsel for the defendant contends that the language of order No. 42 clearly limited the extra train's right of way to a single opposing train, and that was No. 150; and this, he argues, was the construction which McCleary, the engineer of extra No. 6,324 placed upon the order, as is shown by his admission that, after he looked at the order against 150, he knew he had no further order against 156. There are two answers to this contention. The first is that the plaintiff cannot be bound by McCleary's erroneous construction, if it was erroneous, of the order against No. 150; and the second is that the instructions received from Connors "that everything is all right, to go ahead," were shown to have been a part of defendant's regular method of operations. McCleary testified that, in the school of instructions established by the train master for the education of defendant's employees in the rules of the road, the train crews were directed to take the local operator's word as to the movements of trains, and that he (McCleary) had followed that course during his service as locomotive engineer for the defendant, which had continued through a period of four years. This was, therefore, not an isolated case in which a local operator had assumed to give instructions contrary to a written rule, but a compliance with a general custom established under directions from the defendant's train master, who stood in the place of the master for the purpose of seeing "that proper precautions are taken to insure the safety of trains

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and property." The evidence upon that feature of the case was clearly sufficient to create an issue of fact, for if the practice testified to by McCleary had continued for a period of four years, it would have been competent for a jury to find that it was with the consent and approval of the defendant. While we think the case was clearly one for the jury upon that ground, we are also convinced that the general issue as to the sufficiency of the defendant's rules and regulations should have been submitted as a question of fact. The defendant's train dispatcher, who stood in the place of the master, knew that there was a fourth section of train No. 156 north of Machias. The addition of a few words to order No. 42 would have given notice of that fact to the operator at Machias and to the crew of extra No. 6,324. Instead of making the situation entirely clear, the dispatcher sent an order, which, to say the least, was of equivocal import and calculated to create doubt, when there should have been naught but certainty. We think the case is well within the rule of such authorities as *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 332, *Dana v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 639, and *Hankins v. N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616, to the effect that, where a servant is injured by the negligent performance of an act or duty which the master as such is required to perform, the latter is liable, although the negligence was that of another servant to whom the performance of the duty was intrusted, and this without regard to the rank or title of the person guilty of the negligence. We do not regard the cases of *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627, and *North Pac. R. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006, relied upon by the respondent, as being in conflict with the foregoing views or authorities, for, as we read these two cases, they have no application to the facts before us in the case at bar.

The judgment herein should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

ILLINOIS CENT. R. CO. v. BUCHANAN.

(Court of Appeals of Kentucky, June 25, 1907.)

[103 S. W. Rep. 272.]

Charities—Hospitals—Negligence—Injury to Employee—Negligence of Employer.*—A railroad hospital organization was organized as a corporation independent of defendant railroad; its directors being certain officers of the railroad. All employees of the railroad were, as such, members thereof, supporting the hospital by monthly contributions. No profit was derived by the railroad company from the conduct or operation of the hospital. The physicians, surgeons, and nurses in charge were selected by the directors and officers. Held, that for failure to select skillful and competent physicians and attendants defendant was liable to an employee injured by reason thereof.

"To be officially reported."

On petition for rehearing. Former opinion withdrawn, and judgment of lower court in favor of plaintiff reversed, with directions for new trial.

For former report, see 88 S. W. 312.

CARROLL, J. Appellant has established at Paducah, Ky., a hospital known as the "Illinois Central Railroad Hospital," to which are sent as a part of its system of policy all sick, disabled, and injured employees on the lines of its road in the vicinity of Paducah. It was incorporated under the laws of Kentucky, and its directors and officers are taken from the chief officers of the railroad company, and the physicians, surgeons, and nurses in charge are selected by these directors and officers. It does not appear that any profit or gain is derived by the railroad company from the conduct or operation of the hospital. It is supported by monthly contributions exacted from the employees of the company, who are entitled to admission.

Appellee, an employee entitled to admission, was injured in the service of appellant, and sent to the hospital for treatment. In this action he sought to recover damages from appellant upon the ground that the surgeons and attendants who waited upon and cared for him during the time he was confined in the hospital were incompetent and unskilled, and treated his wounds in an unskillful and grossly negligent manner, causing him to suffer great mental and physical pain and incur large expense in attempting to remedy the injuries he received by the negligence

*For the authorities in this series on the subject of the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see foot-notes appended to Yazoo, etc., R. Co. v. Byrd (Miss.), 22 R. R. R. 196, 45 Am. & Eng. R. Cas., N. S., 196.

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and carelessness of the persons who had charge of him. Appellant answered, controverting the matter in the petition, and affirmatively set up that the hospital was a corporation and entirely independent of the railroad company, and the railroad company was not responsible for the acts or conduct of any of the persons in charge of it. Upon a trial of the case, a verdict was returned in favor of appellee, and the railroad company prosecutes this appeal. The case is now before us on a petition for rehearing; the judgment of the lower court having been reversed by this court in an opinion which may be found in 88 S. W. 32, 27 Ky. Law Rep. 1193.

We gather from the record, and the principal opinion of this court, as well as a dissenting opinion found in 88 S. W. 312, 27 Ky. Law Rep. 1215, that the principal question litigated between the parties was whether or not the railroad company was liable at all; this court in the principal opinion saying: "There is no evidence showing that the Illinois Central Railroad Company made any contract with appellee, Buchanan, that he would be properly and skillfully treated by proper and skillful surgeons and attendants. The fact that the hospital association was organized for that purpose does not tend to prove that the appellant made such a contract with the appellee. The Illinois Central Railroad Company is simply the agent, and gathers the funds for the benefit of the hospital association, consequently for the benefit of its members. Doubtless the Illinois Central Railroad Company was indirectly benefited by its employees having proper and humane treatment at the hospital prepared for them; but that incidental benefit cannot raise the question suggested, or make it liable for the act of the servant or agent of an independent corporation. Our conclusion is that the hospital corporation is a separate and distinct corporation from the Illinois Central Railroad Company, and that the latter has no financial interest in the result of its management, and in no way is it liable for the conduct of its directors or physicians or attendants at the hospital. The appellee is a member of the hospital association, and those in charge of it in part serve it and his interests, and he contributes to help pay the expenses of those performing that service and for the care and treatment of his associate employees. A peremptory instruction should have been given to the jury to find for appellant."

Upon a reconsideration of the questions at issue, we have reached a different conclusion from that announced in the opinion heretofore delivered. Although it may be true that the railroad company derives no personal or pecuniary benefit or gain from the conduct and operation of the hospital, yet it manages and controls it, and exacts from its employees sufficient funds to defray at least in part the expenses incurred in its operation. The employees thus contributing have the right to demand admission when injured in the service of the railroad company; but they have no voice in the selection of the physicians, surgeons, or other

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attendants in charge of the hospital. All of these persons are appointed by the railroad company; and, although the railroad company is not liable in damages for the negligence and carelessness or unskillfulness of any of its surgeons, physicians, or attendants in charge in their treatment and care of the employees received into the hospital, yet it is obliged to exercise reasonable care in the selection of the persons who have charge of the patients; and, if it fails to select skillful and competent surgeons, physicians, and attendants, it may be required to respond in damages to any employee who has been injured by such incompetent or unskillful physicians, surgeons, or attendants. When the railroad company employs competent and skillful people, the measure of its duty to its employees is discharged. If these persons should be guilty of malpractice or other acts of negligence, the party injured by reason thereof must look to the individual causing the injury, and not to the railroad company. This view of the duty and obligation of the railroad company is fully supported by the opinion in *Louisville & Nashville Railroad Company v. Foard*, 104 Ky. 456, 47 S. W. 342, where an employee sought to recover damages from the railroad company for the negligent manner in which the physicians furnished by it treated his wounds. The court said: "The appellant was in no way responsible for the acts of the physician, or for his neglect of appellee, unless it be shown that appellant was careless and negligent in his selection, and that he was incompetent. In the employment by a railroad company of its surgeons to attend to persons injured by its trains, the relation of master and servant, principal and agent, does not exist. And, if the railroad company is careful and selects suitable surgeons, it is not responsible for their neglect or malpractice. There is no pretense that appellant was careless or negligent in the selection of this physician and surgeon, or that he was in any way incompetent, and the court should not have permitted appellee to prove the misconduct, neglect or maltreatment of the physician." In *Union Pacific Railroad Company v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581, the same rule is announced in a strong opinion by Judge Sanborn, who said: "It would be a hard rule, indeed, a rule calculated to repress the charitable instincts of men, that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendants, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ; but are responsible only for their own want of ordinary care in selecting them." The doctrine announced in these cases is in harmony with the current of authority upon the subject, and seems to us to be sound in principle. As the selec-

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tion or appointment of persons in charge of the hospital is lodged entirely in the railroad company, they should be charged with the duty of exercising reasonable care in their selection, and held responsible for a failure in this respect. But, when they have in the exercise of reasonable care employed competent and skillful physicians and attendants, it would seriously interfere with the establishment of institutions of this character to hold them responsible for every specific act of malpractice or negligence that they might be guilty of. Of course, this view is based on the assumption that the railroad company does not derive any pecuniary profit or gain from the conduct of the institution. If such were the case, a different standard of responsibility would be established.

In addition to the instructions given on the former trial, the court on another trial of the case should instruct the jury in substance that, if they believe from the evidence that the railroad company or its agents selected or appointed the physicians, surgeons, or attendants at the hospital, then it was its duty to exercise reasonable care in selecting and appointing persons competent and skillful in the profession or business for which they were employed, and, if it failed to exercise reasonable care and skill in this respect, and Buchanan was injured by reason thereof, they should find for him.

Either party should be allowed to file such amended pleadings as may be necessary to fairly present this new issue.

The former opinion of this court is withdrawn, and the judgment of the lower court is reversed, with directions for a new trial in conformity with this opinion.

TRAVIS *v.* KANSAS CITY, S. & G. RY. CO.

(Supreme Court of Louisiana, June 21, 1907.)

[44 So. Rep. 274.]

Railroads—Liability of Lessor—Injury to Employee of Lessee.*—

In the absence of charter or statutory permission to lease its road, a railroad company is held liable for the breach on the part of its lessee of any of those duties imposed upon the lessor company by its charter or by law in favor of the public; that is to say, of carrying freight and passengers safely, and of operating with due care to the safety

*See foot-note appended to *Lewis v. Maysville & B. S. R. Co.* (Ky.), 11 R. R. R. 780, 34 Am. & Eng. R. Cas., N. S., 780, where all the preceding authorities in this series on the subject are collected; foot-note appended to *Georgia R. & B. Co. v. Haas* (Ga.), 23 R. R. R. 536, 46 Am. & Eng. R. Cas., N. S., 536; *Moorshead v. United Rys. Co.* (Mo.), 23 R. R. R. 277, 46 Am. & Eng. R. Cas., N. S., 277; foot-note appended to *Harbert v. Atlanta, etc., Ry. Co.* (S. Car.), 23 R. R. R. 681, 45 Am. & Eng. R. Cas., N. S., 681; *Chicago, etc., Ry. Co. v. Hart* (Ill.), 13 R. R. R. 579, 36 Am. & Eng. R. Cas., N. S., 579.

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of the public generally. But in considering the liability of the lessor company a distinction is made between an employee and the public generally. The employee cannot recover for the breach of a duty arising under the contract of employment, as, for instance, the duty of providing a safe place to work in. The duty of the master to furnish the servant a safe place to work in is nothing more than one of the implied obligations of contract. It is not a duty arising from the general relation which the railroad occupies towards the public or towards the servant as one of the public. The duty to light the yard of the railroad company is not a duty owing to the public by the lessor company, but merely one arising out of the contract of employment. The question of what light shall be furnished to the employee to work by on the premises of the employer is one strictly between the employee as such and the employer as such.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo;
Thomas Fletcher Bell, Judge.

Action by Anna B. Travis against the Kansas City, Shreveport & Gulf Railway Company. Judgment for plaintiff. Defendant appeals. Judgment set aside, and suit dismissed.

Alexander & Wilkinson, for appellant.

Hall & Jack, for appellee.

PROVOSTY, J. Plaintiff's husband was a brakeman on one of the yard, or switching, locomotives of the defendant company. The defendant company's railroad was being operated by another railroad company under some agreement between the two companies, and the contract of plaintiff's husband was with the operating company. He was crushed to death in a collision between the locomotive he was working on and a lot of dead cars that stood in the darkness on the yard of the defendant company. Plaintiff sues for his death, alleging that it occurred through the negligence of the defendant company in having failed while constructing the road to make provision for lighting the yard, and through the negligence of both companies in not having lighted said yard.

Plaintiff invokes the doctrine of *Muntz v. Algiers R. Co.*, 111 La. 423, 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495, and *Hamilton v. Railroad Co.*, 117 La. 243, 41 South. 560, 6 L. R. A. (N. S.) 787, to the effect that, in the absence of charter or statutory permission to lease its road, a railroad company is held answerable for the breach on the part of its lessee of any of those duties imposed upon the lessor company by its charter or by law in favor of the public; that is to say, of carrying freight and passengers safely and of operating with due care to the safety of the public generally.

In considering the liability of the lessor company, however, the courts have made a distinction between an employee and the public generally, holding that the employee cannot recover for the

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breach of a duty arising under the contract of employment, as, for instance, the duty of providing a safe place to work in. *East Line & Red River R. Co. v. Culberson*, 3 L. R. A. 567, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805; *B. & O. Ry. Co. v. Paul*, 28 L. R. A. 216, 143 Ind. 23, 40 N. E. 519; *Caruthers v. Kansas City, etc., Ry. Co.*, 44 L. R. A. 745, 59 Kan. 629, 54 Pac. 673; *Axline v. Toledo, etc., R. Co. (C. C.)* 138 Fed. 169; *Beltz v. B. & O. R. Co. (C. C.)* 137 Fed. 1016; *Williard v. Spartanburg, etc., R. Co. (C. C.)* 124 Fed. 796; *Hukill v. Maysville, etc., R. Co. (C. C.)* 72 Fed. 745; *Curtis v. Cleveland, etc., R. Co. (C. C.)* 140 Fed. 777; *Yeates v. I. C. R. R. Co. (C. C.)* 137 Fed. 947; *Hanna v. Railway Co.*, 88 Tenn. 310, 12 S. W. 718, 6 L. R. A. 727.

The duty of the master to furnish the servant a safe place to work in is nothing more than one of the implied obligations of the contract. *Bailey on Master's Liability for Injury to Servants*, p. 1. It is not a duty arising from the general relation which the railroad occupies towards the public or towards the servant as one of the public.

The learned counsel for plaintiff argues that this duty to light the yard was a duty owing to the public by the lessor company, and not one merely arising out of the contract. We take a different view. We think that the question of what light shall be furnished to the employee to work by on the premises of the employer is one strictly between the employee as such and the employer as such.

The exception of no cause of action should have been sustained.

Judgment set aside, and suit dismissed.

O'NEIL v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, July 5, 1907.)

[112 N. W. Rep. 625.]

Master and Servant—Injury to Servant—Assumption of Risk.*—A person of ordinary intelligence and experience, who works at the foot of an incline from which workmen are employed in taking sand and gravel, and who observes and knows that the men on the bank are loosening the sand with poles in order to make it slide down, so that it can be loaded onto cars at the bottom of the incline, assumes the risk of being caught and injured by the sand thus released.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; John Day Smith, Judge.

Action by Edith G. O'Neil, administratrix of George C. O'Neil,

*See foot-note appended to *Cully v. Northern Pac. Ry. Co.* (Wash.), 13 R. R. R. 165, 36 Am. & Eng. R. Cas., N. S., 165.

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against the Great Northern Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Albert E. Clarke, for appellant.

Rome G. Brown and *Charles S. Albert*, for respondent.

ELLIOTT, J. On April 16, 1906, plaintiff's intestate, George C. O'Neil, lost his life in a gravel pit where he was working for the Great Northern Railway Company. The bank of sand and earth slipped and slid down upon the deceased. In an action brought by the administratrix to recover damages, it was alleged that O'Neil's death was caused by the neglect of the defendant to take the proper and usual precautions to protect its employees against such an accident; by its negligence and carelessness in failing to adopt and use the usual and ordinary methods and devices to prevent said bank of sand and earth from caving or sliding down upon its employees, who were working under defendant's direction and authority at the foot of said bank; in failing to furnish its employees with a reasonably safe place to work; and by placing an inexperienced man in charge of the work. It was also charged that negligent methods of carrying on the work were adopted. The trial court directed a verdict in favor of the defendant. The appeal is from an order denying a motion for a new trial.

At the time of his death O'Neil was between 18 and 19 years of age. He was strong, and had been working since he was 14 years old. On February 26, 1906, he commenced to work for the railroad company in the Cedar Lake gravel pit, and worked there continuously with the crew about the steam shovel and in the sand bank until his death. He was an experienced workman, and was entirely competent to understand the dangers incident to such work. The embankment upon which the crew was working was from 40 to 100 feet in height, and was composed of fine gravel and sand. At the place where the accident happened the bank was about 90 feet high, and slanted gradually from the bottom to the top. There was no overhanging bank at the time of the accident. On April 16th the steam shovel outfit was at work in the pit. O'Neil was working as a jackman. The jack-screw at which he was working was used in connection with the moving of the shovel, as from time to time it became necessary in order to reach the place from which they were taking sand. The sand kept sliding down the bank, sometimes in large quantities, and all the workmen understood that they were working under dangerous conditions. Within a week before the accident there had been big slides, and within two weeks a slide almost as big as the one which buried O'Neil had occurred. Sand came down at times in sufficient quantities to cover the jackblock. One man had been seen to slide down with one of the slides. O'Neil and another man named Nelson were caught and buried beneath a large quantity of sand, which slid down the bank.

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We can see nothing in the facts which distinguish this case from the so-called "gravel pit cases." The bank from which the sand and gravel was being taken sloped gradually from top to bottom. Men were stationed on the bank for the purpose of poling the sand and causing it to slide down in more or less regular quantities. O'Neil was employed at the foot of the slide, and must have been aware of the dangers connected with the work. Nothing was concealed. The conditions were open, and the danger apparent to any one of ordinary intelligence, such as the evidence shows the deceased to have been. He saw the men at work loosening the sand and gravel in order that it might come down to where it could be reached by the shovel. He was bound to take notice of the ordinary familiar laws of nature, and to govern himself accordingly. No special knowledge or instruction was required. "He must be presumed to have had the knowledge which common observation forces on the most ordinary intellect, to have known the effect and operation of the law of gravitation upon a perpendicular bank of earth. He must be presumed to have known that from such causes the earth will break away and fall down, and that the fall must be attended with danger to any one in its way." *Olson v. McMullen*, 34 Min. 95, 24 N. W. 318. It should be noticed that the slide which caught the deceased was not caused by an overhanging bank. It was started on the side of the slope by workmen who were there for that purpose. Under these circumstances, the trial court was justified in instructing the jury that the deceased assumed the risk as a matter of law.

The appellant's contention that a servant assumes only such obvious risks as are necessarily connected with the prosecution of the work in which he is engaged is correct, when properly applied. But the employee also assumes the extraordinary risks which are occasioned by the negligence of the employer when such risks are known and appreciated. Any other rule would destroy the whole doctrine of the assumption of risks, as it can only arise and become applicable after the negligence of the master has been established.

The order of the trial courts is affirmed.

SOUTHERN RY. CO. *v.* CARR.

(Circuit Court of Appeals, Fourth Circuit, April 10, 1907.)

[153 Fed. Rep. 106.]

Master and Servant—Injuries to Servant—Railroads—Negligence of Master.*—Where no injury had ever occurred on account of the eaves of a house projecting slightly over a railroad track for 15 years, the eaves being of a permanent character, and not liable to become impaired by use, the railroad company was not negligent in permitting them to remain in such condition.

Same—Assumed Risk.†—The eaves of a house had slightly projected over a railroad spur track for over 15 years, during which no injury had occurred. There was ample room on top of the cars for a brakeman, in the exercise of ordinary care, to pass along the running board and manipulate the brakes without incurring any danger from the eaves; but plaintiff, though knowing the condition of the eaves, took a position on top of a car with his back toward the house, in which situation he was struck by the eaves, knocked from the car, and injured. Held, that the danger was an open and visible one, which plaintiff assumed.

Same—Instructions—Contributory Negligence—Assumed Risk.—In an action for injuries to a servant, the court charged that, in determining whether an employee has exempted his employer from liability in any particular case because of alleged contributory negligence or assumed risk, the jury should consider the exigencies of his position and all the circumstances of the particular occasion. Held, that such instruction was objectionable for failure to explain the difference between the doctrine of contributory negligence and assumption of risk.

Same—Defective Appliances—Evidence.—In an action for injuries to a brakeman, proof that the brakes on a railroad car failed to work at the time plaintiff was injured was not evidence that the same were defective.

Same—Duties of Master.—The duty of a master to furnish reasonably safe appliances for servants to work with, and to use ordinary care to keep them in repair, does not make the master an insurer of the safety of the servants.

*For the authorities in this series on the subject of the duties and liabilities of railroad companies, as matters, with respect to structures located near or over railroad tracks, see foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361.

†For the authorities in this series on the question whether railroad employees assume the risks from structures over or near tracks, see foot-notes appended to *Wilson v. Lake Shore, etc., Ry. Co.* (Mich.), 21 R. R. R. 356, 44 Am. & Eng. R. Cas., N. S., 356; *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 360.

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Same—Burden of Proof.†—In an action for injuries to a servant by alleged defective appliances, the burden is on plaintiff to show that the master was negligent either in furnishing the appliances or machinery, or that he did not exercise ordinary care in repairing and inspecting them.

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

C. P. Sanders, for plaintiff in error.

Stanyarne Wilson and *J. A. Sawyer*, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PRITCHARD, Circuit Judge. This is an action at law brought by the defendant in error, Joseph Oliver Carr, by guardian ad litem, to recover damages for personal injuries sustained by him while in the employment of the plaintiff in error on the 12th day of December, 1903, as brakeman or flagman. As brakeman and flagman, it was his duty to stand on freight cars and control and stop the same with handbrakes. At the time he was injured he was on the top of the cars which were being pushed into a spur track at Hickory, N. C., and was attempting to put on the brakes. Before he succeeded in so doing, the cars ran under the projecting eaves of a house which was erected near the spur track; the eaves striking defendant in error, knocking him to the ground, and injuring him. There was a verdict and judgment for the defendant in error, from which this writ of error was taken.

The testimony shows that the house standing near the side track had been constructed about 15 years before the injury occurred, the eaves of which projected over the track; that during all this time cars had been constantly shoved in on the side track, passing along by the house and under its eaves, with brakemen on the top of the cars; that no one had ever been injured there before or since the accident in question. The evidence also shows that the brakes immediately after the accident were in good order. It also appears that there was ample room on the car for one, by the exercise of ordinary care, to set the brakes without coming in contact with the overhanging eaves. The eaves projected over the top of the car about 18 inches. This defect, if any, was not latent, but patent and easily observed. The person injured was familiar with the location of the house, track, and overhanging eaves, and while at work on top of the cars had passed along this track by the house quite a number of times. In passing along on

†See foot-notes appended to *Stewart v. Raleigh*, etc., R. Co. (N. Car.), 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to *Norfolk & W. Ry. Co. v. McDonald's Adm'x* (Va.), 22 R. R. R. 101, 45 Am. & Eng. R. Cas., N. S., 101; foot-notes appended to *Vissman v. Southern Ry. Co.* (Ky.), 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; foot-notes appended to *St. Louis*, etc., R. Co. v. Hill (Ark.), 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20.

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this occasion he stood on the side of the car with his back toward the house. It was shown that he failed to look to ascertain whether he was in danger of coming in contact with the eaves of the house, notwithstanding he knew he was in close proximity to the house. While in this position, the car ran under the eaves, and he, being struck by the same, was knocked off and injured. It was shown that there was ample room for him to have stood on the car and set the brakes without coming in contact with the eaves.

It appears from the record that at the conclusion of the testimony in chief on behalf of the defendant in error, and again at the conclusion of all the testimony, the plaintiff in error moved the court to direct a verdict on the following grounds:

"(1) That there is not sufficient evidence of negligence shown on the part of the master.

"(2) That the injury which came to Mr. Carr came from one of the risks assumed by him when he entered the service of plaintiff in error.

"(3) That, if there is any evidence of negligence on the part of the master, the evidence clearly shows contributory negligence on the part of Mr. Carr."

The court below refused the motion to direct a verdict, but at the same time stated:

"I am doubtful if the plaintiff has the right to recover in this case. I am inclined to think that this injury was the result of his own negligence; but I think there is a question for the jury, and I will let it go to the jury."

The plaintiff in error excepted to the refusal of the court to direct a verdict, and also excepted to the charge of the court because it did not distinguish between the defense of assumption of risk and that of contributory negligence.

It is a well-settled rule that the master must furnish safe appliances and a reasonably safe place in which to work. The testimony shows that, if he had remained on the running board which is laid along the center of the top of the car, he would not have been injured, or, if he had taken the precaution to have stepped to the opposite side of the running board, he would have been still further removed from the point which he occupied when injured. It is true that he claims the brake was defective, and that he could not successfully operate it on that occasion, but the uncontradicted evidence shows that the brake was in good condition just immediately after the accident occurred.

John White, who was conductor of the switch engine and crew, among other things, testified as follows:

"Q. On this occasion state whether or not a brakeman could have gone through there, if he had been looking, without being struck by those eaves? A. Yes, sir; he could have gone through there without being struck.

"Q. Did you examine the brakes afterwards? A. I got my brakes stake and went up on the cars and examined them to see if they was all right.

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"Q. What did you do? A. I put them on.

"Q. Did you put them on, or were they on? A. No, sir; he had them on enough to stop the car. I tried to see if they were sprung, or anything had caught so they would not turn.

"Q. Could you turn it any more? A. Yes, sir.

"Q. What was the condition below? A. Chains were all right, and brake rods all right.

"Q. How was the shoe? A. All right.

"Q. Could a man stand between the brakes and the center-board and put on brakes, and not come in contact with that? A. Yes, sir; he could stand on that side.

"Q. After these cars were started in there, was it time enough for a man to put on both brakes there? A. Oh, yes, sir; a long time."

E. C. Kliner, who was at the same time employed as a brakeman, testified, among other things, as follows:

"Q. Did you know anything about the condition of those brakes on those two cars? The conductor examined them?

"(Objected to by Mr. Wilson.)

"Mr. Sanders: Q. Unless you saw him—did you see him examine them? A. He called my attention to it.

"Q. Were you there when he did it? A. Yes, sir.

"Q. What was the condition of those two brakes? A. I could not see anything wrong about them. I did not try to hold them. I don't know anything about their holding.

"Q. Explain to the jury how they are operated, and what causes them to hold? A. When you wind it, it winds up on the brake. The chain winds up the brake.

"Q. And that throws a pressure against the wheel? A. Yes, sir.

"Q. On this occasion you saw nothing out of order? A. No."

Even if the brakes had been defective, there is nothing to show that the master had knowledge of such defect, and, under the circumstances, the master having furnished safe appliances, to wit, brakes that were in good condition, if the same became defective without the knowledge of the master, he could not be held responsible therefor; it appearing that he had in the first instance furnished reasonably safe appliances and had used due diligence to keep the same in a reasonably safe condition, as the evidence shows the master did on this occasion. No injury ever having occurred on account of the projecting eaves during all the time cars had been carried by this point, and the eaves being of a permanent character and not liable to become impaired by use, as in the case of machinery, it must be presumed that the master exercised reasonable care.

Labatt, in his work on Master and Servant (volume 1, § 136), states the rule as follows:

"The true doctrine applicable in this connection seems to be rather this: That the previous safe and successful operation of the instrumentality is conclusive in the master's favor, provided

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that it appears that he has not been derelict in regard to his duty of active inspection at reasonably sufficient intervals, and no circumstances which would have put a prudent man on inquiry has come to this knowledge."

We have carefully considered all of the evidence offered in the court below, from which it appears, as hereinbefore stated, that the party injured had been in the employment of the plaintiff in error for a considerable length of time, and was thoroughly familiar with his surroundings, and the dangers incident thereto.

In determining whether a reasonably safe place has been furnished the servant in which to work, it is necessary to ascertain the character of the danger which is sought to be avoided. For instance, if a servant is required to work in the open, where he can readily observe the conditions surrounding him, the same degree of caution is not required of the master as in cases where a servant is required to work in a place where he is not afforded the means of comprehending as fully dangers by which he may be confronted.

Thompson on Negligence (volume 4, § 3772), in discussing this phase of the question, says:

"As in other situations, this ordinary or reasonable care, by whatever term it is designated, varies according to the danger to be avoided. For example, the care required of the master, under this rule, in respect to machinery and appliances, is much less where the service required to be performed is on the surface of the earth, in open day, and its character and appliances are simple, than when the machinery used is dangerous and complicated, or the work is performed in a place or at a time when the surrounding dangers are not so obvious."

When the spur track was constructed, the eaves of the house projected over the same, and the cars had been passing thereunder almost daily for 15 years prior to the date of the accident, and no injury had occurred prior to that time, and there was ample room on top of the car for one who exercised ordinary or reasonable care to pass along so as to manipulate the brakes without incurring danger. The injured understood these arrangements perfectly well, and, even if he had not taken particular care in observing how far the eaves extended over the car, it was not the fault of the master. It was the duty of the defendant in error to see a thing which was plain, open and patent.

It is insisted that the court below erred in granting the following request which was offered by the defendant in error. "In determining whether an employee has exempted his employer from liability, in any particular case, because of the alleged contributory negligence or assumption of risk on the part of the employee, the jury should take into consideration the exigencies of his position and all the circumstances of the particular occasion. While regarding his own safety, he should also bear in mind his duty to his employer." *Kane v. Railroad Co.*, 128 U. S. 95. 9 Sup. Ct. 16, 32 L. Ed. 339. It is insisted by the plain-

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tiff in error that the Kane Case, *supra*, is not analogous to the case at bar, and that the doctrine announced therein does not apply to the facts in this case. In that case the facts were as follows:

"It was in evidence that at midnight, in the month of February, a train of freight cars, belonging to or being operated by the defendant, left Marysville on its line of road, for the city of Baltimore. The rear car was the caboose. The third car from the caboose was an ordinary 'house car.' The fourth one was laden with lumber. The car upon which the plaintiff was required to take position while the train was in motion was about the eighth or tenth one from the caboose. His principal duty was to "brake" the train from that car back to the caboose. When the train, moving southward, was going into York Haven, 20 miles from Marysville, the plaintiff, while passing over it for the purpose of putting down the brakes, discovered that the third car from the caboose had one step off at the end nearest the engine, and immediately called the attention of the conductor to the fact. The conductor promised to drop that car at the coal yard or junction beyond them in the direction of Baltimore, if, upon looking at his manifest, he found it did not contain perishable freight.

"When the train stopped, about 4 or 5 o'clock in the morning at Coldfelters, some miles north of the coal yard or junction, the plaintiff went to the caboose to eat his breakfast and warm himself. It was snowing, freezing, and sleeting. One of the witnesses testified that 'it was a fearful cold night, raining, and sleeting. * * * It was almost bitter cold. The rain was freezing as it fell—a regular winter's storm.' While the plaintiff was in the caboose eating his breakfast, the train moved off. He immediately started for his post, leaving behind his coat and gloves. Upon reaching the south end of the third car from the caboose, he attempted to let himself down from it in order to reach the next car ahead of him, which was the lumber car, and pass over the latter to the one on which he usually stood while the train was in motion. At the moment he let himself down from the top of the house car, he forgot that one of its steps was missing; and, before realizing the danger of his position, and without being able then to lift himself back to the top of the car, he fell below upon the railroad track and between the wheels of the moving train, causing him to lose both legs. The plaintiff testifies that if, at the moment of letting himself down from the top of the car, he had recalled the fact that one of its steps was gone, he might have pulled himself back with his hands, or have 'slid down' on the brake rod, for he had before climbed up and down by holding that rod with one hand and putting his foot against it and pulling himself up until he touched the running board."

The foregoing statement shows that the knowledge of the defect, to wit, the missing step, was brought to the attention of

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the conductor who in turn assured the party injured that the car would be dropped at the next station, and, in the absence of information from the conductor to the effect that he had not removed the car, the party injured was justified in assuming that the same had been dropped, and that any car that he might attempt to climb upon would be in a reasonably safe condition. The information he had received from the conductor, taken together with the exigencies of the occasion, were sufficient to relieve the plaintiff from the charge of contributory negligence, as the court very properly held in that case.

In the case of *Kane v. Railroad Co.*, *supra*, among other things, it was said:

"But it is said that the efficient, proximate cause of the injury to the plaintiff was his use of the defective appliances at the end of the car from which he fell, when he knew, and, at the moment of letting himself down from that car should not have forgotten, as he said he did, that one of its steps was missing. It is undoubtedly the law that the employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. *Hough v. R. R. Co.* [100 U. S. 224, 25 L. Ed. 612], *Dist. of Columbia v. McElligott* [117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946], and *Goodlett v. Louisville & Nash. R. R. Co.* [122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230], above cited; *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755."

In submitting the instruction hereinbefore referred to, the court failed to explain to the jury that the rule in regard to contributory negligence was different from the one which pertains to assumption of risk. These two defenses being essentially different, and not depending upon the same principles of law, the granting of this instruction was calculated to confuse the minds of the jury in determining the issues submitted for their consideration. In the case at bar the injuries sustained resulted from dangers that were so open, patent, and obvious that a reasonably prudent man, situated as the injured person was on that occasion, could have avoided the same if he had exercised ordinary care and caution. Therefore the rule announced in the *Kane Case*, *supra*, and relied upon as controlling in this case, does not apply.

Even if the brake had been defective, as contended by counsel for defendant in error, it is shown by the evidence that if he had stood on the running board, or near thereto, that he could have avoided all danger; but in utter disregard of dangers that were well known to him, for some unknown reason, he took a position on the car which necessarily brought him in contact with the

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eaves of the house, and was thereby injured. Under the circumstances it cannot be contended that his injury was in any wise due to the negligence of the plaintiff in error.

It is insisted by defendant in error that the brakes failed to work at the time he was injured. This is not evidence that the same were defective. It is true that the master is required to furnish his employees with reasonably safe appliances with which to work, and to use ordinary care in keeping the same in repair; but the rule does not go to the extent of constituting the master an insurer. If the master negligently fails to perform his duty towards his servants in providing them with reasonably safe appliances with which to work, or fails to inspect such appliances, and injury results therefrom, then he can be held liable for injuries which may be received by his servants by reason of such failure. In an action like the one at bar, the burden is on the plaintiff to show one or the other of these facts. He must either show by competent evidence that the master was negligent in furnishing the appliances or machinery, or that he did not exercise ordinary care in repairing and inspecting the same. These facts must affirmatively appear in order to entitle the plaintiff to recover.

"The mere fact of the accident is not enough to establish negligence. There must be additional and affirmative proof of the particular negligence which caused the accident, and it must also appear that the master had opportunity of previous knowledge." 1 Bail. Mas. & Servt. § 406.

"The presumption is that the master has done his duty by furnishing safe and suitable appliances, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the master had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery; but it must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises." 1 Bail. Per. Inj. Mas. & Servt. § 365.

The evidence in this case fails to show that the master was negligent in any respect. It was shown by the defendant in error that he undertook to operate the brake, but that it would not hold. Further on in his cross-examination he said, "I wound the chain up tight," which shows that the chain was not broken. Even if in attempting to set the brakes he had broken the chain, this of itself would not have constituted negligence on the part of the master. However, the uncontradicted evidence of the conductor and brakeman is to the effect that immediately after the accident the brake was found in perfect order. Under these circumstances, we do not think that there was sufficient evidence as to the negligence of the defendant company to warrant the submission of the case to the jury.

In the case of *Edgens v. Mfg. Co.*, 69 S. C. 529, 48 S. E. 538, the court said:

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"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was."

The learned judge who tried the case below was evidently impressed with the fact that there was not sufficient legal evidence to entitle the plaintiff to recover, and, in discussing this phase of the question, said:

"I am doubtful if the plaintiff has the right to recover in this case. I am inclined to think that this injury was the result of his own negligence; but I think there is a question for the jury, and I will let it go to the jury."

While there are a number of exceptions to the charge of the court, at the same time, we do not deem it necessary to consider the same, feeling, as we do, that there is not sufficient legal evidence from which the jury could infer that the injury sustained was the result of the negligence of the defendant in error.

For the reasons herein stated, the judgment of the Circuit Court is reversed, and the case remanded to that court, with instructions to set aside the verdict, award a new trial, and to proceed thereafter in accordance with the views herein expressed.

EDINGTON v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Missouri, Division No. 2, May 14, 1907.)

[102 S. W. Rep. 491.]

Master and Servant—Injuries to Servant—Action—Burden of Proof.*—In an action for injuries to a servant, the burden of showing contributory negligence is on defendant.

Same—Questions for Jury.—In an action for injuries to a brakeman while coupling cars, held a question for the jury whether he had selected a dangerous method of making the coupling when a safer one was apparent to him.

Same—Failure to Warn Servant.—It was negligence for a yard-master directing the making up of a train to fail to notify a switch crew that the train would be moved by the road engine while certain coupling work was being done; it being customary for the train to be moved at such times only by the switch engine.

*For the authorities in this series on the subject of the burden of proving contributory negligence, see foot-notes appended to *Elgin, etc., Ry. Co. v. Hoadley* (Ill.), 22 R. R. R. 663, 45 Am. & Eng. R. Cas., N. S., 663; *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 20 R. R. R. 609, 43 Am. & Eng. R. Cas., N. S., 609; *Adams v. Boston & N. St. Ry. Co.* (Mass.), 21 R. R. R. 70, 44 Am. & Eng. R. Cas., N. S., 70; foot-notes appended to *Mississippi Cent. R. Co. v. Hardy* (Miss.), 21 R. R. R. 1, 44 Am. & Eng. R. Cas., N. S., 1.

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Appeal from Circuit Court; Jefferson County; Frank R. Dearing, Judge.

Action by Nathaniel Edington against the St. Louis & San Francisco Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. F. Parker and John W. Booth, for appellant.

A. R. Taylor, for respondent.

BURGESS, J. This is an action for damages for personal injuries sustained by plaintiff on the 6th day of February, 1902, while in the service of defendant as a switchman in the yards of defendant in the city of St. Louis. The trial resulted in a verdict and judgment for \$8,000 in favor of plaintiff. After unsuccessful motions for a new trial and in arrest of judgment, defendant appealed.

The petition, in substance, stated that the defendant at the time alleged was a corporation by virtue of law, and used and operated the railway and engines and cars mentioned in the petition as a steam railroad in the city of St. Louis; that on the 6th day of February, 1902, at the yards of defendant on Chouteau avenue, east of Tower Grove avenue, in said city, plaintiff was in the service of defendant as a switchman, and a part of his duties as such was to couple and uncouple engines and cars. That on said day, about 9:45 p. m., the defendant's agent and yardmaster ordered and commanded the plaintiff to couple the engine and caboose with which he was working to a caboose car attached to another train and detach it therefrom, and remove it from the track on which it was; that, in obedience to such order and command, the plaintiff and his fellow employees, with said engine, was proceeding to so couple said engine and caboose to said caboose car, and whilst the plaintiff was in the work of making said coupling defendant's servants in charge of the train to which said caboose car was so attached negligently caused said train to be backed without any notice to plaintiff thereof, causing the plaintiff's right arm to be caught between the coupling apparatus of said caboose cars and to be so crushed as to necessitate its amputation, requiring two amputations of said arm; that the defendant's said agent and yardmaster was negligent in ordering said train to be backed whilst the plaintiff was engaged in making said coupling, without any notice to plaintiff, which said negligence directly contributed to cause the plaintiff's said injuries; that by his injuries so sustained the plaintiff has suffered and will suffer great pain of body and mind, has been permanently crippled and disabled, and has lost and will lose the earnings of his labor and avocation as a switchman, has incurred and will incur large expenses for medicines, medical and surgical attention, to his damage in the sum of \$25,000, for which sum he prays judgment. Defendant's answer consisted of a general denial, a general plea of contributory negligence, and a general plea of assumption of risk.

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It appears from the evidence that plaintiff was an experienced switchman, and as such was employed by the defendant in its Chouteau avenue yards in the city of St. Louis. Said yards were switch yards, used for making up trains to go out on the main line. Besides the main track, there were five other tracks, called "switch tracks," branching off from the main track at various intervals, and used for making up trains. One of these tracks led to the scales for weighing cars, and was called the "scale track." The others were known as "tracks Nos. 1, 2, 3, and 4." The general direction of all said tracks was east and west. On the night of February 6, 1902, plaintiff was one of a switching crew of four men employed in making up a freight train of some 25 or 30 cars on said track No. 1; the other members of the crew being Tom O'Hara, foreman, Gus Langhoff, and Neal McDaniels. The train was about ready to leave the yards when the fact was communicated to James Glaslier, the night yardmaster in charge of the yards, that the air apparatus of one of the cars about midway in the train was defective. He immediately ordered that the car be taken out and kicked on the scale track, saying, "I will ride it down and have it on the hind end by the time you get coupled up." In order that the defective car might be placed at the rear or east end of the train, it was necessary to remove the caboose car from that end and place the "bad air car" between it and the train. About the time the above order was given by the yardmaster, it would appear that the switch engine and plaintiff and McDaniels were on the scale track, and the yardmaster gave them an order to go to the rear end of the train, take the caboose off, bring it against the scale track, and pick up a car that would be placed there by the road crew of the train, and then place said car and caboose at the rear of the train. Thereupon plaintiff and McDaniels, with the switch engine, went to the rear of the train, which was standing on track No. 1. There they found an unattached caboose; or what in railroad parlance is termed a "dead caboose," and were about to couple the switch engine thereto, when they received a signal from switchman Langhoff to return. They returned, and were telling Langhoff that the yardmaster had sent them after the train caboose, when Glaslier himself came up and asked them why they did not do as he told them, and he then repeated his order. Plaintiff and McDaniels, with the switch engine, went back on track No. 1. McDaniels coupled the engine to the "dead caboose," and plaintiff ran around said caboose in order to couple it to the caboose on the rear of the train. A moment afterwards McDaniels heard plaintiff hallow, "Neal, I am caught." The cabooses were provided with automatic couplings, consisting of movable knuckles, one on each drawhead, and so contrived with reference to each other that, when one of the knuckles was open, a coupling could be made by simply bumping the cars together. It would appear that the drawheads of the two cabooses were only about 18 inches apart at the time, and that, while plaintiff

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was in the act of opening one of the knuckles with his hand, the train of cars in front suddenly backed and plaintiff's right arm, above the elbow, was caught between the drawheads of the two cabooses and injured so that it was necessary to amputate it. The evidence showed that, while such couplers could be opened with the foot or by means of a stick provided for that purpose, yet it was generally done by hand. Plaintiff's own evidence in that regard was that "you don't open the knuckles with a club," and that he used it to set brakes with. Defendant's witness, James Glaslier, also testified that this work is generally done with the hand. It was also in evidence that plaintiff had control of the switch engine to the extent that he could, by signal, have it backed further away so as to allow him more room before stepping in to open the coupler; but the plaintiff testified that, if he took time to do that, "they would send him home." Witness Langhoff also testified that, "if the yardmaster should see him do that, there might be some trouble about it." At the close of plaintiff's evidence, and again at the close of all the evidence, defendant asked for an instruction in the nature of a demurrer thereto, which was refused, and defendant duly excepted.

The only point insisted on by appellant for the reversal of the judgment appealed from is that plaintiff was guilty of negligence which contributed directly to his injury. Contributory negligence is an affirmative defense, and, like any other defense of an affirmative character, the burden is upon the defendant to establish it to the reasonable satisfaction of the jury. Defendant insists that, according to the evidence, there were three ways by either of which plaintiff might have opened the knuckle of the automatic coupling: First, by having the switch engine backed and the drawheads separated such a distance as would permit him to safely open the knuckle with his hand, if he deemed it necessary to use his hand; second, by the use of his switchman's stick; third, by inserting his arm in the narrow space between the drawheads, and opening the knuckle with his hand. Plaintiff pursued the latter course in opening the knuckle of the drawhead, and defendant contends that it was the most dangerous way, and that plaintiff must have known that it was so, in view of these facts: That it was night and dark; that he knew the western caboose was in touch with a live locomotive and an intervening string of cars without lights on them; that said locomotive was not at the time where he could signal to it; that, while he had no other light than that of his lantern, he went between the two cabooses, the drawheads of which were only 18 inches apart, and put his arm in imminent peril of being cut off by any little bump from the western engine, which he had no assurance would not give such bump; that he knew the persons in charge of the western locomotive had no notice of the close proximity of the drawheads, or of his determination to assume so dangerous a position. In 1 Bailey on Personal Injuries Relating to Master and Servant, § 1121, it is said: "It is a familiar principle which common

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sense, as well as the rules of law, ought to teach any one, that where an employee of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence." The same rule is announced in *Moore v. Railroad*, 146 Mo. 572, 48 S. W. 487; *Hurst v. Railroad*, 163 Mo. 309, 63 S. W. 695; *Smith v. Box Co.*, 193 Mo. 715, 92 S. W. 394. But as to whether plaintiff knowingly selected a dangerous way when a safer one was apparent to him was for the determination of the jury. The verdict of the jury was for plaintiff, the effect of which verdict was that plaintiff did not knowingly select a dangerous way to open the knuckle of the coupling when he knew there was a safer one. The question of contributory negligence was presented to the jury by instruction No. 6, at the instance of defendant. It is as follows: "The court instructs the jury that although you should find from the evidence that the yardmaster of defendant railway company was guilty of negligence in giving the order for the coupling of the cars, or if you find that the employees of the defendant in charge of the train which was caused to back against the caboose car which was to be coupled by plaintiff were guilty of negligence in backing said train against said caboose, yet if you further find that the plaintiff was also negligent in attempting to make the coupling under the circumstances, and that his act in so attempting to make such coupling in any wise contributed to his injury, then he is not entitled to recover in this case." As to whether the plaintiff or switch crew knew that a car was to be taken out of the train, and thus necessitate a recoupling, the evidence showed that neither the plaintiff nor any of the switch crew knew where the car was coming from which was to be placed between the caboose and the rear of the train, and that none of them knew the object of detaching the caboose. Plaintiff testified that from where he was at work he could see the west end of the train, that it was not customary for engines to work at both ends of the train, and that he never saw it done before in that yard.

Neal McDaniels testified that he knew nothing of there being anything done at the west end of the train and that he was not notified that there was. Gus Langhoff testified that when switching was being done, like this was, on the end of a train made up to go out on the road, it was not usual or customary to have the road engine do the switching, and that he never knew them to work both the road engine and the switch engine at the same time. This witness also testified that he had been working for defendant as a switchman, in the same crew with plaintiff, between 9 and 11 months, and had been a railroad man 12 or 14 years. This evidence tends to show that it was unusual to do work as it was done at the time of plaintiff's injury, and that there was no warning to plaintiff or anything done to apprise him of his danger. The testimony also showed that plaintiff had no control whatever over the road engine, his work being done with

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the switch engine, which was standing still, obedient to his signal, at the time the road engine backed and bumped the cars together. We think the evidence clearly showed the yardmaster was negligent in failing to notify the switch crew that there would be a movement of the train while the work of coupling was being done, and thus forewarn them of the danger. The instructions are unchallenged, and presented the case fairly to the jury. the verdict is well warranted by the evidence, and should not, in our opinion, be disturbed.

The judgment is affirmed. All concur.

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(Supreme Court of Kansas, June 8, 1907.)

[90 Pac. Rep. 990.]

Trial—Instructions—Requests.—If a defective request for an instruction actually brings to the attention of the court an important principle of law which ought to be stated to the jury in order that it may render an intelligent verdict, it may be prejudicial error to disregard it; and, if an attempt be made by an instruction given to submit to the jury the matter defectively covered by the request, it should be sufficiently explicit and comprehensive to cover fairly the field of the request.

Same—Assumption of Risk.*—It is the duty of a master to make the conditions of his servant's work reasonably safe. One of the conditions is that the servant be furnished with reasonably careful co-

*For the authorities in this series on the question of the degree of care required of a railroad, as an employer, see foot-notes appended to *Shandrew v. Chicago, etc., Ry. Co.* (C. C. A.), 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588; foot-notes appended to *Collins v. Louisville & N. R. Co.* (Ky.), 22 R. R. R. 78, 45 Am. & Eng. R. Cas., N. S., 78; *Vissman v. Southern Ry. Co.* (Ky.), 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; foot-notes appended to *Cincinnati, etc., Ry. Co. v. Hill's Adm'r* (Ky.), 22 R. R. R. 52, 45 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *Anderson v. Northern Pac. Ry. Co.* (Mont.), 21 R. R. R. 23, 44 Am. & Eng. R. Cas., N. S., 23; foot-notes appended to *Wiest v. Coal Creek R. Co.* (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risk by employees, see foot-notes appended to *Peterson v. Philadelphia, etc., R. Co.* (Pa.), 23 R. R. R. 150, 46 Am. & Eng. R. Cas., N. S., 150; foot-notes appended to *Gulf, etc., Ry. Co. v. Huyett* (Tex.), 22 R. R. R. 637, 45 Am. & Eng. R. Cas., N. S., 637; foot-notes appended to *Farney v. Oregon Short Line R. Co.* (Utah), 21 R. R. R. 529, 44 Am. & Eng. R. Cas., N. S., 529.

For the authorities in this series on the question whether railroad employees assume risks from their fellow servant's negligence or incompetency, see foot-notes appended to *Louisville & N. R. Co. v. Wyatt's Adm'r* (Ky.), 20 R. R. R. 413, 43 Am. & Eng. R. Cas., N. S., 413.

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servants; but, if the master fail in the performance of this duty, the servant, with knowledge of the facts and appreciation of the danger, may voluntarily accept the situation, and, if he does so without complaint or promise of change, the risk is assumed to the same extent as if it had originally entered into the contract of employment.

Same.—If, upon complaint to the master that the conditions of the work are unsafe, he refuses to better them, and the servant, understanding the danger, continues to work, he assumes the risk.

Same.†—If under the circumstances just stated injury befall the servant as a result of the defective conditions, the question of what a reasonably prudent man would have done upon the master's declination to remedy them is immaterial. If the servant in fact voluntarily chose to assume the risk of appreciated danger, the prudence of his conduct is not open to investigation.

Same—Independent Contractor.‡—It is not essential that one who engages a contractor to produce a given result should reserve, or should interfere and take, complete or exclusive control over all features of the work to render him liable as master of the contractor's servants; but the fact that he possesses a limited or partial control will not entail such a liability if the contractor is still left free to exercise his own will generally respecting the methods and means of accomplishing the result.

Same.‡—If an employer in fact assumes the relation of master to the servants of one whom he has engaged to produce a given result, the duties and the responsibilities which the law imposes upon such a relation attach.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Edward H. Loosley against the Kansas City, Mexico & Orient Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

John A. Eaton and Holmes & Yankey, for plaintiff in error.

Stanley & Stanley and Houston & Brooks, for defendant in error.

†For the authorities in this series on the question whether an employee assumes the risks from defective appliances, unsafe work place, or other dangerous conditions, of the existence of which he has knowledge, see foot-notes appended to *Clippard v. St. Louis Transit Co. (Mo.)*, 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107.

‡For the authorities in this series on the question whether a railroad company is liable for the negligence of an independent contractor employed by it, see foot-notes appended to *Choctaw, etc., Ry. Co. v. Wilker (Okl.)*, 23 R. R. R. 759, 46 Am. & Eng. R. Cas., N. S., 759; foot-notes appended to *Noggle v. Carlisle & Mt. H. Ry. Co. (Pa.)*, 21 R. R. R. 627, 44 Am. & Eng. R. Cas., N. S., 627; *Clark v. St. Louis, etc., Ry. Co. (Ark.)*, 21 R. R. R. 39, 44 Am. & Eng. R. Cas., N. S., 39; *St. Louis, etc., Ry. Co. v. Gillihan (Ark.)*, 20 R. R. R. 624, 43 Am. & Eng. R. Cas., N. S., 624; foot-notes appended to *Boyd v. Chicago, etc., Ry. Co. (Ill.)*, 20 R. R. R. 154, 43 Am. & Eng. R. Cas., N. S., 154.

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BURCH, J. The plaintiff, alleging himself to be an employee of the defendant, recovered damages for personal injuries sustained through the carelessness of a co-employee whom it was charged the defendant had been negligent in selecting. The plaintiff had been in railroad service ever since he was 18 years old, beginning as baggage master about the year 1875. After four or five years he became a freight conductor, and then became a passenger conductor. At the time of his injury he was the conductor of a construction train operated by a construction company engaged in building the defendant's railroad. In the absence of one of his brakemen, the plaintiff was also acting in the capacity of brakeman. On April 25, 1903, while working in the yards at Carmen, O. T., he directed a flying switch to be made to change the engine from the south end to the north end of a string of cars. He was riding the disconnected cars toward the south intending to stop them just beyond a switch. The engineer followed them down at a rapid rate of speed, struck them before the switch was reached, coupled to them, and then stopped with such violence that the plaintiff was thrown from his position on the top of a car to the ground, where he struck on his head. When the flying switch was executed, there was a water car, called a "pioneer car," and a box car, in front of the engine. The brakeman who threw the switch rode on the ladder of the box car as the engine proceeded toward the south, and, in violation of his duty, neglected to give the proper signal in time to prevent a collision. When it was too late he gave a signal which caused the engineer to stop with a shock after the coupling had been made. The defendant's answer contained the following allegation: "That at the time the plaintiff received said injuries of which he complains in said amended petition, and immediately prior thereto, he, said plaintiff, was guilty of contributory negligence whereby the said alleged injuries were caused and occasioned, and at said time the said plaintiff so placed himself upon the train and car, and so moved thereon, and remained in such position, when he knew, or by the exercise of ordinary care, might have known, that upon the coupling of said cars the same would be jarred and suddenly moved, and while in said position, and so negligent, as aforesaid, and in disregard of all precautions on his part for his own safety, the said plaintiff received the injuries aforesaid by reason of his negligence aforesaid, and at said time and place, while plaintiff was so engaged as brakeman upon said train and cars, he well knew, or by the exercise of ordinary care might have known, of each and all of the dangers and hazards incident to his employment as brakeman, the risk and hazard thereof being by said plaintiff at the time of said injuries, and prior thereto, assumed." It is clear that contributory negligence and assumption of risk are both pleaded. The plaintiff concedes that the defense of contributory negligence is interposed, but disputes that the other is made. If a separate paragraph had been made beginning with

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the words "at the said time and place while plaintiff was so engaged," there could be no doubt about the matter. As it is, the meaning is perfectly plain; and, in the absence of a motion to make it more specific, the answer sufficiently charged assumption of risk. Besides this, in instruction No. 11, not excepted to, the court told the jury the plaintiff assumed the ordinary risks of the negligent acts of his co-employees, and in instruction No. 15, not excepted to by the plaintiff, the court told the jury it was for them to determine from the evidence whether the plaintiff assumed the risk resulting in his alleged injuries. Therefore there can be no dispute that assumed risk was a litigated issue.

On the trial much evidence was introduced relating to the manner in which the brakeman, whose name was Mills, was in the habit of performing his duties, and much evidence relating to the plaintiff's knowledge of his conduct. From the evidence the jury made the following special findings of fact: "Q. Was brakeman Mills in the habit of carelessly and negligently performing his duty as brakeman in, and about the switching and coupling of cars during the month of April, 1903? A. Yes. Q. Was brakeman Mills grossly negligent in and about the discharge of his duties as brakeman in and about the shifting and coupling of the cars at the time and place in question on the day plaintiff claims to have been injured? A. Yes. Q. If you answer 'Yes' to the last above question, then did such negligence of brakeman Mills materially and proximately contribute to causing any of the injuries to plaintiff complained of by plaintiff? A. Yes. Q. Did the plaintiff as conductor, Mills as brakeman, and Ballou as engineer, become members of the same crew in running the construction train before the plaintiff was injured? A. Yes. Q. Was not the plaintiff, Mills, and Ballou members of the same crew from about the 1st of April, 1903, till the accident? A. Yes. Q. Was not the movement of the train and switching of the cars during which Loosley was injured under his direction and control? A. Yes. Q. Did not the plaintiff participate in and assist in the movement of the cars and doing the switching in the manner in which it was done just prior to the accident? A. Yes. Q. Had not the switching of cars by the construction crew, of which plaintiff was conductor, been done in a similar way on previous days before plaintiff was injured? A. Yes. Q. Had not the plaintiff for about 25 days prior to the accident been in charge as conductor of the train crew wherein engineer Ballou and brakeman Mills were working? A. Yes. Q. During that time was it not his duty to observe the character of the work of engineer Ballou and brakeman Mills? A. Yes. Q. Had not engineer Ballou and brakeman Mills been daily under conductor Loosley, the plaintiff, several days in April, 1903, immediately prior to the accident? A. Yes. Q. Did not the plaintiff know at the time of the accident the character of the work that the engineer Ballou, and brakeman Mills had been doing? A. Yes. Q. Had not the plaintiff an opportunity to

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know and see the work of brakeman Mills for several days in April, 1903, prior to the accident in which plaintiff was injured? A. Yes. Q. Was not the work of brakeman Mills for several days prior to the accident under the control of the plaintiff as conductor of the train? A. Yes. Q. For how long a time before plaintiff was injured were the plaintiffs Mills and Ballou members of the same crew? A. Twenty or 25 days. Q. Did the plaintiff ever make objection to the defendant, Kansas City, Mexico & Orient Railway Company, prior to the accident to the character of the work of engineer Ballou and brakeman Mills, or either of them? A. No."

Upon a state of the evidence productive of these findings the defendant requested the following instruction: "The court instructs the jury that, if the plaintiff knew, or by the exercise of ordinary care might have known, that either the engineer Ballou, or the brakeman, Mills, or either of them, were incompetent or habitually negligent, and after such knowledge, or after by the exercise of ordinary care he might have had such knowledge, he continued his work as conductor upon the construction train, or if he acted as brakeman in the place of one of the other brakemen temporarily absent, without having made objection as to such incompetency or habitual negligence of such engineer and brakeman, or either of them, he will then be deemed to have assumed the risk of such incompetency or negligence of such engineer and brakeman, or either of them, and he therefore cannot recover for any injury resulting from such incompetency or habitual negligence." The request was refused, but, recognizing the necessity of not ignoring altogether the defense of assumed risk, the court inserted the two disconnected references to it discovered in the following prolix instruction: "In determining as to whether or not the plaintiff may recover against the defendant, the Kansas City, Mexico & Orient Railway Company, you are instructed that it is for the jury alone to determine from the evidence in the case as to what injuries, if any, plaintiff received as claimed by him, and the extent of such injuries, if any, and as to what negligence, if any, the defendant railway, its servants, agents, and employees were guilty of, as charged by plaintiff, and as to whether plaintiff was or was not guilty of any negligence in the premises, or as to whether plaintiff assumed the risk resulting in any of the alleged injuries, and as to whether or not the said brakeman Mills and engineer Ballou, who are charged by plaintiff with the negligent acts which plaintiff claims resulted in his injury, were subject to the control of the defendant company at the time and place in question, and said train was being operated by said railway company, and if you determine that the plaintiff and said brakeman Mills and engineer Ballou were then and there subject to the control of the defendant railway company, and were guilty of the negligent acts charged at the time and place in question, it is for you then to further determine as to whether said brakeman Mills was on said 25th day of April,

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1903, and for some time prior thereto, and unfit, incompetent, and unsafe person to be placed and retained in the position of brakeman, and, if so, then, as to whether the defendant railway company knew, or by the exercise of ordinary care on his part should have known, of such unfitness and incompetency in time to have acted on such information and avoided the injury, if any, to plaintiff; and it is for you to determine as to whether plaintiff knew or should have known of such unfitness and incompetency of said Mills, and, if you find that he was unfit and incompetent, or was guilty of contributory negligence contributing to the injury complained of, if any he received, and you are to determine as to whether the alleged negligence of said Mills, if he was negligent as charged, materially and directly contributed to plaintiff's injury, if any he received, and you are instructed that all of these questions and all the issues and facts are to be determined by you from the evidence in the case, and if you determine all of the issues in favor of the plaintiff and against the said railway company, being guided by all the instructions herein—then your verdict should be against the railway company and in favor of the plaintiff in this action, otherwise it should be in favor of said railway company."

The defendant claims the court erred in refusing its request. The plaintiff argues that the instruction tendered was faulty, and hence was properly refused. For present purposes, it may be conceded that this is true. It may further be conceded that, without a request, the court was not obliged to instruct upon the matter involved. But, if a defective request actually brings to the court's notice an important principle of law which ought to be stated to enable the jury to render an intelligent verdict, it may be prejudicial error to disregard it; and, if an attempt be made by an instruction to submit the subject defectively covered by the request to the consideration of the jury, it should be sufficiently explicit and comprehensive to cover fairly the field of the request. Manifestly the instruction given is no equivalent for the instruction asked. Indeed, so far does it come from containing an explication of assumed risk that, in its effect upon a jury unlearned in the law, it would more likely bewilder than enlighten. The question was one of the most important the case presented. It was vigorously contested. It is one the least understood by laymen. The effect upon the plaintiff's right to recover of his voluntarily working without protest day after day for a long period of time with a man who was habitually negligent in the very matter which resulted in the casualty, whose work it was the plaintiff's duty to observe and direct, and the character of which he knew, was clearly brought to the mind of the court. It was in fact dealt with, but inadequately and inconclusively, and, in view of the character of the special findings returned, the result was prejudicial to the defendant. Therefore, even upon the hypothesis that the instruction is inaccurate, the court erred. The instruction

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requested, however, fairly states the law as it has long been established in this state. With the addition justified by the decision in the case of *U. P. Ry. Co. v. Monden*, 50 Kan. 539, 31 Pac. 1002, that, if an employee in the exercise of reasonable care ought to have known of the dangers of the service, he will be held to the consequences of actual knowledge, the instruction is in full accord with the doctrine stated in the case of *K. P. Ry. Co. v. Peavey*, 34 Kan. 472, 8 Pac. 780. In that case the plaintiff was a yardman. An engineer of a switch engine was in the habit of carelessly sending cars back too hard. On an occasion he did this, and the yardman was injured in an attempt to make a coupling. Discussing the facts the court said: "Peavey knew Ellis's competency, capacity, and habits, and he well knew them, for he himself had ample capacity and opportunity to judge. They had been co-employees together in the same yard for a long time. Also Peavey himself had great experience as a railroad man." As applicable to these facts the court announced the following rule of law: "If an employee knows that another employee is incompetent or habitually negligent, or that the materials with which he works are defective, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence, or defects, and cannot recover for an injury resulting therefrom."

It is the duty of the master to make the conditions of a servant's work reasonably safe. One of the conditions is that the servant be furnished with reasonably careful co-servants. But, if the master does not perform this duty, the servant with knowledge of the facts and appreciation of the danger may voluntarily accept the situation, and, if he does so without complaint or promise of change, the risk is assumed to the same extent as if it had originally entered into the contract of employment. Here the plaintiff was an old railroad man, whose duty during the greater part of his life had been to oversee the work of brakemen. For 25 days he had observed, as it was his duty to observe, the conduct of this brakeman in reference to switching and coupling cars, and knew that the disregard of those precautions for the safety of others which an ordinary man would take was the characteristic form of his behavior. There is some evidence which might or might not be taken as a complaint to the superintendent of the construction company, but no evidence that any change was promised or hoped for. There is evidence that, on the occasion of the conversation with the superintendent of the construction company, the superintendent said that he believed the brakeman to be competent, but there was ample evidence to warrant the jury in finding as it did that the plaintiff knew him to be incompetent. Therefore, before this injury occurred, the conditions under which the plaintiff knew he would be obliged to work were established with a brakeman who was habitually negligent forming a part of the master's equipment. This being true, the principle to be

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applied is identical with that announced in the case of *A., T. & S. F. Rld. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965, in which it was charged the master did not provide sufficient help. The syllabus reads as follows: "While it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employees as safe as is reasonably practicable, yet when the employee, with full knowledge of all the dangers incident to or connected with the employment as it is conducted, accepts the employment, or, having accepted the same, continues in it with such full knowledge, and without any promise on the part of the employer, or any reason to expect on the part of the employee, that the employment will be made less dangerous, the employee assumes all the risks and hazards of the employment." In *Rush v. Mo. Pac. Ry. Co.*, 36 Kan. 129, 12 Pac. 582, the second paragraph of the syllabus states the law as follows: "But, where a railway is so constructed and a competent railroad man is employed to work in one of the company's yards as yard switchman, and in such yard there are many switches and about 20 guard rails, and the employee voluntarily and without complaint does switching in such yard every day for about 2½ months, when he steps between the main rail and the guard rail of one of the company's railway tracks, and because thereof receives injury, held, that the condition of the railway tracks and the danger must have been known to the employee, and therefore that he assumed the risk." In the case of *S. K. Ry. Co. v. Drake*, 53 Kan. 1, 35 Pac. 825, the opinion reads: "He rests his case wholly upon the failure of the company to furnish sufficient help. He was an experienced man, of full age, capable of judging what number of employees was necessary to safely do the work, and, if there was an insufficient number, he knew that as well as the company knew it. The work was simple, and the risks and dangers were obvious. Possessed of a knowledge of the men employed, the manner in which the work was to be done, and the hazards which it involved, he voluntarily accepted employment, and continued in the service of the company, and must be deemed to have assumed the risks incident to such service. We only follow in the path of authority in holding that an employee, by voluntarily remaining in the service, with full knowledge of the dangers of the service, assumes the risks of such dangers, and absolves the employer from liability for damages in case of injury." The cases cited above and the following cases contain the principal and most illustrative decisions of this court upon the subject under consideration: *McQueen v. C. B. Rd. Co.*, 30 Kan. 689, 1 Pac. 139; *St. L. & S. F. Rd. Co. v. Irwin*, 37 Kan. 711, 16 Pac. 146, 1 Am. St. Rep. 266; *Clark v. Mo. Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138; *S. K. Ry. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138; *U. P. Ry. Co. v. Monden*, 50 Kan. 540, 31 Pac. 1002; *S. K. Ry. Co. v. Drake*, 53 Kan. 1, 35 Pac. 825; *Morbach v. Mining Co.*, 53 Kan. 731, 37 Pac. 122; *A., T. & F. Ry. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343;

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Railway Company v. Puckett, 62 Kan. 770, 64 Pac. 631; *Lanyon v. Bell*, 64 Kan. 739, 68 Pac. 609; *Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232; *Railway Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253; *Walker v. Scott*, 67 Kan. 814, 64 Pac. 615; *Railway Co. v. Sledge*, 68 Kan. 321, 74 Pac. 1111; *Hoffmeier v. Railway Co.*, 68 Kan. 831, 75 Pac. 1117; *Schwarschild v. Drydale*, 69 Kan. 119, 76 Pac. 441; *Brinkmeier v. Railway Co.*, 69 Kan. 738, 77 Pac. 586; *Creamery Co. v. Daniels*, 72 Kan. 418, 83 Pac. 986; *Railroad Co. v. Burgess*, 72 Kan. 454, 83 Pac. 991.

These decisions outline the law of assumed risk about as follows: When a servant is given employment, he has the right to take it for granted that the duty of the master to make the conditions of the employment reasonably safe has been performed. He assumes no risk arising from the master's negligence in this respect, and need not institute an investigation for damages resultant upon the master's lack of ordinary care. The master, however, has the right to order his work after his own plan, and to conduct it after his own methods. If this involve hazards beyond those ordinarily incident to employment of the kind presented, the servant should be informed of them. Starting upon this footing, the servant assumes the risks. If at any time afterward the servant be confronted with danger consequent upon the master's negligence, the question may arise whether a reasonably prudent man would encounter it. The servant must then act with reasonable care, and, if he does not, he will be chargeable not with assumption of risk, but with contributory negligence. In the progress of the work defects and imperfections may develop which in due course are ordinarily remedied as a result of inspection, and, while waiting for this to be done, the conduct of the servant is to be judged upon the principles of contributory negligence, and not upon those of assumption of risk. If the master fail to make the employment reasonably safe, and the danger takes on the aspect of a continuing condition which the servant knows about and understands, or which is so patent that ordinary care would bring it to his attention and appreciation, he may accept the situation and continue to work without complaint. If he does so, he assumes the risk. On the other hand, he may apply to the master for a betterment of the condition. If what the servant regards as a danger be one respecting which the master has superior knowledge, he may rest upon the master's assurance of safety, if any be given. Under some circumstances, too, the master's statements or representations may induce the servant to relax his vigilance. But, if nothing of this kind occur, or if master and servant are on an equal footing in opportunity for knowledge of the facts and inability to interpret them, and the servant knows or ought to know and duly appreciates or ought to appreciate the danger, and continues to work, he assumes the risk. If the master promises to repair, to discharge, or otherwise render safe, the danger may still be so glaring that a reasonably

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prudent man would not expose himself to it until a change is made. If so, and the servant continues to work, he is guilty not of assumption of risk but of contributory negligence. If the hazard is not so great but that with reasonable prudence the work may still be carried on, the servant may, exercising due care, work a reasonable time awaiting repairs or other promised removal of danger without either assuming the risk or being negligent. If, after the lapse of such time, the promised betterment is not installed and the negligent condition again takes on the character of permanency, the servant assumes the risk. If upon complaint to him the master makes no promise to repair, or refuses to change the negligent condition, the servant is in the same attitude as if he were originally applying for work in a business organized and conducted upon a negligent basis, the dangers of which he knows and appreciates. If he goes on, he assumes the risk. In case of injury the question is not what a reasonably prudent man would have done or ought to have done. It is simply what the servant with his eyes open in fact chose to do. Reasonable prudence is not involved. Under the circumstances stated the servant must decide whether or not he will assume the risk, and, if he does so, the reasonableness of his conduct in point of care for his safety is not open to investigation.

In Missouri and perhaps in some other jurisdictions an attempt has been made to ingraft the rules of contributory negligence upon assumption of risk after the master's neglect or refusal, upon complaint, to remedy conditions negligently suffered to exist, and the authorities to that effect are invoked here. Such a rule is arbitrary with the court adopting it, and for the reasons stated is unsound. The subject has been disposed of by this court in the following language by Chief Justice Horton: "Usually, where some instrument or appliance has become unsafe, from use or otherwise, and the danger from its use is not imminent or obvious, the servant may continue in the master's employment, and use it for a short time, with the expectation that the master will restore the defective instrument or appliance to its former condition. *Rush v. Mo. Pac. Ry. Co.*, 36 Kan. 129, 12 Pac. 582. But, if a servant continues in his work an unreasonable length of time after the master has agreed to remedy the defect complained of, or if the danger is imminent or obvious, he assumes the risks incident thereto. Generally the question of reasonable time is one of fact for a jury; but, where a servant has full knowledge of the danger of his employment, as in this case, after his first injury, and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait, and, after being injured, then claim damages. He should leave his dangerous employment within a reasonable time, on discovery of the master's method of doing business, when he finds that the master will not remedy the danger or fulfill his promise in that respect." *Morbach v. Mining Co.*, 53 Kan. 731, 740, 37 Pac. 122.

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The case of Northern Pacific Railroad Company v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296, holding that mere notice of incompetency will not make continued service for a short time with an incompetent co-employee contributory negligence, is cited as opposed to the law of assumed risk stated above, but it is not so. The defense in that case was contributory negligence, and not assumed risk, and the decision makes no reference to assumption of risk. From the foregoing it is clear that the judgment of the district court must be reversed, and it becomes necessary to consider some other questions likely to be of moment on a second trial.

The petition counted specifically upon the relation of master and servant between the plaintiff and defendant, and the negligence charged was want of care in the selection of the servant at the time he was employed. The answer denied that the plaintiff was a servant of the defendant, and charged that he was a servant of the Kaw Valley Construction Company, an independent contractor which was engaged in constructing the defendant's road. It also contained the following allegation: "This company had no voice or authority in the employment of any of the agents or servants of the said Kaw Valley Construction Company, nor did it employ any of the same, nor did it have the right, power, or authority to discharge, remove, or direct any such employees, nor did it employ or have any authority or direction over any of the other employees of said Kaw Valley Construction Company engaged in the operation and moving of the train mentioned and stated in plaintiff's amended petition." The train crew of which plaintiff was a member was hired by the construction company. The work of construction progressed towards the south. The road had been turned over to the defendant to Carmen, and the defendant had installed an operating department with jurisdiction to that point. South of Carmen the construction company was in full control. The construction company's material yards at Carmen were north of the station, and its trains in the Carmen yards were subject to the time card, rules, and regulations of the defendant and used tracks belonging to the defendant. What the defendant's rules and regulations were does not appear. The testimony concerning the relations between the construction company and the railroad company was furnished chiefly by the superintendent of the defendant. He said he was responsible to his company for administering its affairs in the yards at Carmen and north of Carmen; that he had absolute control over all trains there; that he would not surrender the control over the operation of construction trains on tracks within his jurisdiction; that men on the construction trains would be subject to his orders, and were subject to his company's rules and regulations. But the extent of his supervision, direction, and control he made definite by the following testimony: Q. In Carmen what were the rights of your company with respect to the rights of the construction company? A. Well, there was not any special rights given to

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either the construction company or the railroad. The construction company's material yard was located in Carmen and consequently they had to come to Carmen. Q. How did they operate, and how did you operate in Carmen? A. Well, each company came into the yards when they had to do their work, looking out for the other so that no trouble would occur. No special rights given to either company in the yards. Q. You stated that the fellows operating the train were under your supervision while they were on the road? A. Yes, sir. Q. I want to ask you whether these men that were operating this construction train at the time Mr. Loosley was hurt was under your supervision? A. Whether I had jurisdiction? Q. No; not jurisdiction, supervision and direction. A. I, as to their own work? Not as to the work they should perform, or how they should perform it. Q. Did you have anything to do with that? A. Nothing. Q. Mr. Foley, you have already stated that the Kaw Valley [construction company] was engaged in the building of the road? A. Yes, sir. Q. And, after the 1st day of April, the railroad company commenced operating the line from Milton to Carmen? A. Yes, sir. Q. Now, after it commenced to operate to Carmen, did the construction continue to go on? A. Yes, sir. Q. Where? A. South of Carmen. Q. Was there some construction, such as surfacing and ballasting, going on, and putting in additional ties, north of Carmen? A. Yes, sir; some unfinished track north of Carmen. Q. Who was looking after or doing the work of finishing that track? A. The Kaw Valley Construction Company. Q. Was that work going on during the month of April, 1903, both north and south of Carmen in the manner in which you have stated? A. Yes, sir. Q. What right or authority did you have over the road south of Carmen during the month of April, 1903? A. None. Q. What right or authority to employ or discharge the men of the construction company that were engaged in its work, either in handling its construction trains on the work or construction, did you have during the month of April, 1903? A. I had none. Q. Had the yards or work in the yards been completed? A. Yes, sir. Q. At Carmen—been completed during the month of April, 1903? A. I do not remember about that. Some tracks in there, but I cannot say whether all were finished or not. Q. If there was any work incomplete in the yards, whose duty was it? A. The Kaw Valley Construction Company. Q. Did you have any control or direction with reference to how that work should be done? A. No, sir; none whatever. Q. When a material train was brought from the south or front into Carmen, for the purpose of switching and moving cars to secure one of these construction trains, did you have control, authority, or direction as to the manner in which they should handle their train? A. No, sir. Q. What material or appliance of any kind or supplies did the construction company have at Carmen during the month of April, 1903? A. Had rails, ties, bridge timbers, bolts, spikes, and all material necessary to

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build a railroad. Q. Where did they have that, with reference to the yards in Carmen? A. On the old main track, and afterwards built a material track from the old main track to increase their yard. Q. Did you have any jurisdiction or control over the employment of that material, or its being handled or taken and hauled to the front on the construction train, or the employees engaged in such work? A. I had no authority over the handling; had nothing to do with the handling of the material or the men in the work. Q. What was the facts as to the operation of the construction train from the south into Carmen by the construction company during the month of April, 1903? A. The construction train would enter the yard if they had been out on the road. Their first duty would be to examine the register and see whether the regular trains had arrived, and then they would go ahead and do whatever work that was necessary, and get any orders or information in regard to the trains overdue. They would get that from my office. But in regard to their work in the yard, or going into the yard, there would be no orders necessary." The contract for the construction of the road which was introduced in evidence made the construction company an independent contractor with full dominion over the work of construction, and with no responsibility to others respecting its conduct or management or in any other respect, except for the character of the result. There was no evidence of any actual interference on the part of the defendant with the management, direction, or control of the construction train upon which plaintiff was injured, or with reference to the particular work or steps of the work in which it was then engaged. There was evidence that the train and its crew were doing purely construction company business at the time plaintiff was injured. There was no evidence that the work being performed was of any interest or concern to the defendant. The cars which were being moved were to be placed upon a side track. Near the switch was a coal car used for the purpose of coaling the defendant's engines. It was the plaintiff's intention to take this car out, attach it to the cars he was switching, and then set them on the side track, so that the coal car would occupy the same position respecting the switch and main track it did before. What benefit it was to the defendant to take this coal car out and put it back the plaintiff does not pretend to suggest.

Upon this state of the evidence the plaintiff abandoned the theory of an actual hiring, and requested the court to instruct upon the theory of supervening control on the part of the railway company over the construction company's servant which was done. The defendant insists that the instructions departed from and were at variance with the petition, but, in view of the allegations of the answer quoted above, it may fairly be said that the question of responsibility consequently upon efficient control was within the issues. The authoritative instruction upon the subject was No. 15, quoted above. From this instruction the jury might very

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well have drawn the inference that, if the brakeman Mills and engineer Ballou were, at the time of the casualty, subject to the control of the defendant to any extent or for any purpose, the defendant would be liable. The words "authority," "direction," "supervision," "superintendence," "control," and others of like character may indicate much or little and this court is unable to say what the trial court intended. It is not essential that one who engages a contractor to produce a given result should reserve or should interfere and take, complete or exclusive control over all features of the work to render him liable as a master of the contractor's servants, but the fact that he possesses some control will not necessarily entail such liability. No matter if the control go to the extent of conditioning the work in many aspects, still, if the contractor is left free to exercise his own will generally respecting methods and means, he is independent, and the employer is not the master of his own servants. This distinction between a limited, special, or partial control residing with the employer and a general control over methods and means vested in the contractor has been recognized in the following among other pertinent cases: *Scarborough v. Ala. Midland Railway Company*, 94 Ala. 497, 10 South. 316; *Callahan v. Burlington & Missouri R. R. Co.*, 23 Iowa, 562; *Miller v. Minnesota & N. W. Ry. Co.*, 76 Iowa, 655, 39 N. W. 188, 14 Am. St. Rep. 258; *Eaton v. European and North American Railway Company*, 59 Me. 520, 8 Am. Rep. 430; *Cuff, Adm'x, v. Newark & New York R. R. Co. et al.*, 35 N. J. Law, 17, 10 Am. Rep. 205; *Hughes v. Railroad Co.*, 39 Ohio St. 461; *Rogers v. Railroad Company*, 31 S. C. 378, 9 S. E. 1059; *Powell v. Construction Company*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139; *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32; *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322; *Humpton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776; *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411; *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 528; *Wood v. Cobb and Another*, 95 Mass. 58; *Rait v. New England Furniture & Carpet Co.*, 66 Minn. 76, 68 N. W. 729; *Kelly v. Mayor, etc., of New York*, 11 N. Y. 432; *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; *Erie v. Caulkins*, 85 Pa. 247, 27 Am. Rep. 642. See, also, *Kan. Cent. Ry. Co. v. Fitzsimmons*, 18 Kan. 34; *Hemphill v. Hemphill*, 38 Kan. 220, 16 Pac. 457; *C. R. I. & P. Ry. Co. v. Groves*, 56 Kan. 601, 44 Pac. 628. See, also, *Richmond v. Sitterding*, 65 L. R. A. 445, 475, note. It may be conceded that the superintendent of the railway company made statements which, if taken literally, might indicate that he had complete dominion over every movement of the construction company's trains and every detail of their work at Carmen, and the plaintiff had the right to go to the jury upon them. But a fair inference from his testimony as a whole is that the construction company's trains were under his jurisdiction and subject to the time card, rules, and regulations of

the railroad company merely to the extent necessary to prevent conflict and confusion from the joint use by the two companies of the same tracks and yards; that the railroad company was not doing the work of the construction company in any sense; that it was not pro tanto building its own road; that all the details in the prosecution of that work were left to the full discretion of the construction company; that the superintendent could not say when a train should take out material, or when it should return to the material yards, or prohibit it from going or returning, or say how it should be handled, or who should handle it, and so generally respecting the manner and means of carrying out the construction company's contract, and the defendant had the right to go to the jury upon this theory. If the jury had taken this view, they might have found that the railway company had "control" over the plaintiff's train in the sense that it was on track turned over under the contract, that it was subject to the railway company's time card, rules, and regulations, and that it was under the jurisdiction of the railway company's superintendent, and yet they rightfully might have returned a verdict for the defendant. The instructions should have protected the defendant in this respect, so that it could not be made to respond when it was not in fact a superior. Of course, if an injury should result proximately from any exercise or abuse of the limited power retained by an employer, he would be liable; and, if in fact his control was general over manner and means and not limited or partial in the sense pointed out, he would be liable whether he exercised it or not. If an employer in fact assumes the relation of master to the servants of one whom he has engaged to produce a given result, the duties and responsibilities which the law imposes upon such a relation attach. The imposition of all accrued costs upon the defendant as a condition of permission to amend its answer during the trial seems too severe under the circumstances, and the order to that effect is set aside.

The evidence upon another trial may be such that a discussion of other assignment of error would serve no useful purpose.

The judgment of the district court is reversed, and the cause is remanded for a new trial. All the Justices concurring.

ATLANTIC COAST LINE R. CO. *v.* MALLARD.

(Supreme Court of Florida, Division B., June 12, 1907.)

[44 So. Rep. 366.]

Master and Servant—Injury to Servant—Action—Evidence.—In an action by the widow of a deceased locomotive engineer against the railroad company in whose employment he was at the time of his death, to recover damages for his death, alleged to have been caused by the negligence of the railroad company, and where the issues made by the pleas were that the engineer was killed by running his engine into the rear of a passenger train standing in the limits of a railroad yard, where it was his duty to take precautions for the protection of his own train, which duty was well known to the engineer, but which he negligently failed to observe, but heedlessly and recklessly ran into the train standing on the track on the main line at a place where, and a time when, he had reasonable cause to believe that standing trains would be encountered, which negligence caused or contributed to his death, it was erroneous on the trial to deny the railroad company the right to prove that the engineer was killed under the circumstances alleged in the pleas, because the "yard limits" were not defined with signboards marked "yard limits," in accordance with a rule of the railroad company that such yard limits would be so defined, as by such a ruling the case was tried on an issue not made by the pleadings.

Same—Yard Limits—Negligence.*—A railroad yard, as a matter of fact, is a place where cars and trains are deposited and switched from one track to another, and trains are made up, and it consists of the various tracks, switches, and other facilities used for such purposes, the actual limits and boundaries of which may, or may not, be well known to the employees who use it. Where a rule of a railroad company states that yard limits would be defined by signboards marked "yard limits," it may, under certain circumstances, be negligence in such company not to so define them, and, if one is injured in consequence of such negligence, it may afford the basis for an action for damages.

Pleading—Pleas Setting up New Matter.—Where special pleas set up new matter in defense, and there is a joinder of issue thereon, such joinder creates an issue as to the truth of the new matter, but does not furnish the basis for avoiding the effect of the new matter by other new matter.

*For the authorities in this series on the question whether a railroad company is responsible for injuries to its servants resulting from non-compliance with rules made for the protection of its employees, see foot-notes appended to *Murphy v. Galveston, etc., R. Co. (Tex.)*, 23 R. R. R. 90, 46 Am. & Eng. R. Cas., N. S., 90.

Atlantic Coast Line R. Co. v. Mallard

Witnesses—Competency—Transactions with Decedent.†—In an action for damages brought by the widow of a deceased locomotive engineer against the railroad corporation, in whose employment he was at the time of his death, for the negligent killing of her husband, the agents and employees of the corporation are competent witnesses as to transactions with the deceased engineer relevant to the issues. Declarations and admissions of the deceased engineer not a part of the *res gestæ* are excluded by the rule laid down in *Jacksonville Electric Co. v. Sloan* (Fla.) 42 South. 516.

(Syllabus by the Court.)

Error to Circuit Court, Alachua County; Bascom H. Palmer, Judge.

Action by Carrie D. Mallard against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

R. A. Burford and *Carter & Layton*, for plaintiff in error.

W. W. Hampton and *A. H. King*, for defendant in error.

HOCKER, J. In July, 1906, Carrie D. Mallard, the defendant in error, hereinafter called the plaintiff, sued the Atlantic Coast Line Railroad Company, the plaintiff in error, hereinafter called the defendant, in the circuit court of Alachua county, for damages on account of the death of her husband, William H. Mallard; the suit being brought under sections 3145 and 3146 of the General Statutes of 1906. On the trial she was given a verdict for \$32,000, and judgment was entered thereon. From this judgment a writ of error was sued out from this court.

The two counts of the declaration on which the case was tried are as follows:

"Carrie D. Mallard, widow of William H. Mallard, deceased, hereinafter mentioned, by A. H. King, her attorney at law, sues the defendant, Atlantic Coast Line Railroad Company a corporation doing business in the state of Florida, in an action of trespass on the case, for this, to wit: That before and during the time herein set forth the defendant was, and still is, a corporation doing business in the state of Florida, and owning, maintaining, and operating a railroad line and system of railroads in the county of Alachua, state of Florida; that on the 2d day of June, A. D. 1906, the said William H. Mallard, was employed by the defendant in the capacity of engineer, and on the same day being so employed the said William H. Mallard, was on one of the locomotives, to wit, locomotive No. 249 of the defendant company, then and there attached to a train of cars operated by the de-

†For the authorities in this series on the subject of the credibility of railroad employees as witnesses for their respective companies, see foot-notes appended to *Central of Georgia Ry. Co. v. Bagley* (Ga.), 15 R. R. R. 172, 38 Am. & Eng. R. Cas., N. S., 172; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; foot-notes appended to *Macon & B. R. Co. v. Bevis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

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defendant; and while on said locomotive about 4 o'clock a. m. on said day, near the town of Newberry, and west thereof, in the county of Alachua, and state of Florida, the said William H. Mallard was engaged in the performance of his duties as engineer, and while so engaged said train was being run on the main line of defendant from the Y below and west of the said town of Newberry, eastward near the said town of Newberry, until the said train arrived at a point where a sharp curve ends on a steep downgrade, on said main line; that at this point, and to wit, 100 feet eastward from said curve, in the middle of such steep downgrade, the defendant had left a passenger train, lying on said main line, where it was impossible under the circumstances, for the engineer then in his place on said locomotive to see the said obstruction on said track and line far enough ahead to stop the train of cars aforesaid, descending said grade, before reaching the train of cars left on said main line; that while said train of cars was descending the grade, as aforesaid, there appeared for the first time to the fireman on said engine, within the distance of to wit, two car lengths, said passenger train, which had not up to that time appeared to the said William H. Mallard, by reason of the track conditions aforesaid, and in front thereof a freight train of, to wit, 20 cars in length, upon said main line, at a standstill; that the defendant had carelessly and negligently left its said train of cars upon said track, and before the said William H. Mallard, in the exercise of due care and caution, could stop the train of cars upon which he was engineer, or save himself, the said train came into collision with the said passenger coach of defendant, and then and thereby the said William H. Mallard was crushed against and upon the boiler of said locomotive, and by reason of said collision the said William H. Mallard was so wounded, bruised, broken, and crushed that he departed this life on said day killed by the defendant. Wherefore a cause of action has accrued to this plaintiff, the widow of the said William H. Mallard, deceased, against the defendant. Wherefore plaintiff sues the defendant, and claims \$50,000 damages.

"And, for a second count, the plaintiff avers all the averments of the first count, and further says: The said passenger coach and train had been carelessly and negligently left lying upon the said track by the defendant, and that there was no warning, signal, or notice of any kind given of the presence of the said coach and train, so left lying upon the main line of the defendant, and there was no guard, flagman, or other person, or any signal or warning, then and there provided, to give notice; nor was any notice or warning given of the presence and position of such coach, train, or trains of cars so lying upon said main line of defendant. And the plaintiff says the defendant negligently and carelessly left its said coach and train so lying upon its said main line without signals, warning, or guard of any kind to indicate their presence, and that by reason of the carelessness and negli-

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gence aforesaid of the defendant the said locomotive came into collision with said passenger coach, and the said William H. Mallard, in the exercise of due care and caution, was then and thereby caught, pinioned, held, and crushed against and upon the boiler of said locomotive, and was then and thereby so bruised, lacerated, broken, and torn, in and throughout his abdominal regions and groin, and in and upon his head, that the said William H. Mallard on said day departed this life, killed by the defendant, whereby a cause of action has accrued to this plaintiff, the widow of the said William H. Mallard, deceased, against the defendant. Wherefore plaintiff sues the defendant, and claims \$50,000 damages."

To these counts the defendant filed, first, a plea of not guilty, and, second, a plea that Mallard's death was caused by his own carelessness and negligence, and not by any alleged carelessness or negligence on the part of defendant, and the following special pleas:

"(3) And, for a third and further plea to the first and second counts of plaintiff's declaration, this defendant says that said William H. Mallard was, at the time of the alleged homicide, the engineer in charge of engine known and designated as 249, which engine, with a train of cars attached and in charge of the said Mallard as engineer, was run as an extra train from Jacksonville, Fla., to Newberry, Fla., on the 1st day of June, 1906. On arrival at Newberry on said date, the 1st day of June, 1906, it became necessary for said extra freight train, drawn by engine 249 as aforesaid, to make use of the Y at Newberry, in order for the said engine and such cars as it was then and there drawing, to turn its course and be again headed for Jacksonville over the line of defendant's road running between Jacksonville and Newberry, as aforesaid, in order that the said engine, with such cars as might be attached thereto, might leave Newberry on the morning of the 2d day of June, 1906, on the return trip from Newberry to Jacksonville. After the cars drawn by engine 249 had been run into said Y track, and the turn made on said Y, said Mallard, as engineer in charge thereof, on the evening of said day of June 1, 1906, moved said engine and cars attached to a point on the main line of the Jacksonville & Southwestern Railroad track, then and now owned and controlled by the defendant, near the old depot on said line, and west of the crossing of said line with what was formerly known as the line of the Savannah, Florida & Western Railroad, which said line of road was then, and is now, owned and controlled by this defendant; and at or near said point of location of the old Jacksonville & Southwestern depot the said engineer, Mallard, left the engine and train standing 'tied up' for the night. Between the time that said engine and cars were left standing on said main line as aforesaid, and before the time for departure on the return trip to Jacksonville, on the following day, it became necessary for another train of the defendant, in the ordinary conduct of

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defendant's business at said town of Newberry, to enter said main line, and to accomplish this the said train, in order that it might enter upon said main line, backed the said engine 249, with the cars attached, to a point westward on said main line track into the Y, and there the said engine 249, with the cars attached, remained until the following morning. The location of the Y and of the other tracks of the defendant from the point where engineer Mallard moved his train from the Y to the main track, leading to Jacksonville on the morning of the following day, to wit June 2, 1906, up to and beyond the point where the collision occurred, is within the yard limits at Newberry, which fact was well known to the said Mallard while operating his said engine and cars between said Y and the point where the collision occurred, and beyond said point to the crossing of said railroad tracks, within which limits it was the duty of the said Mallard to look out for and afford protection to his own train running at such a rate of speed and to so handle the same as to render it easily and completely under control, which fact and duty was well known to the said Mallard. And the defendant says that, notwithstanding this said duty, well known to the said Mallard as aforesaid, he, the said Mallard, moved out from the Y, on to the main line, and ran his train of cars at such a rate of speed and without making airbrake couplings or connections, with which said train of cars was provided, and thus failed to have said train under easy and proper control, and in so doing the said engineer, Mallard, was guilty of negligence which either caused or contributed to the injuries resulting in his death.

"(4) And, for a fourth and further plea to the plaintiff's first and second counts of the declaration, the defendant says and avers all the averments of the third plea, and further says that the said engineer, Mallard, failed to take any precautions to protect his own train, as it was his duty so to do, but heedlessly and recklessly ran into a standing train upon the main line at a place where, and at a time when, the said engineer, Mallard, did have reasonable cause to believe that standing trains, cars, or other obstructions would be encountered, and in so doing the engineer, Mallard, was guilty of negligence which either caused or contributed to the injuries resulting in his death, and this the defendant is ready to verify."

Issue was joined on these pleas, and on these issues the case was tried. The facts show that on June 2, 1906, the defendant owned and operated a line of railroad running from South Florida in a northerly direction, formerly known as part of the "Savannah, Florida & Western Railroad," through the town of Newberry, in Alachua county; and also owned and operated a line of railroad from the city of Jacksonville, in Duval county, through the town of Newberry, and terminating at a place called Tyler, about seven miles southwest of Newberry. This road was formerly known as the "Jacksonville & Southwestern." This last road crossed the track of the former at Newberry.

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On the 1st of June, 1906, William H. Mallard was a locomotive engineer in the employ of the defendant, and on that day came out from Jacksonville to Newberry on the line of the Jacksonville & Southwestern on an extra train, in charge of engine designated as 249. It appears that he arrived at Newberry somewhere about noon, and the rest of the day he spent in switching, removing, and placing cars on the various tracks around the vicinity of the depot, as his train had merchandise for the north, south, and for Newberry, and had worked every track in Newberry. When the switching was done, the train and engine was left tied up for the night on the main line near where the accident occurred in which Mallard was killed. During the night another train came in, and, having occasion to use the main line track, backed this train out on to a Y about a mile from the depot. The crew were asleep at the time, and when they awoke in the morning they found the train on the Y. In the morning, engineer Mallard waked up the conductor Perry, telling the conductor he would be ready to move off as soon as he got up steam. The conductor told him: "All right." When the engine was ready, Mallard blew three times, a signal for backing up. The conductor had the switch opened and let the train out of the Y. There was a sharp curve and deep cut and a steep grade between the Y and the depot, where the conductor expected to make up his train and get his orders. His train then contained six or seven box cars loaded with lumber, and perhaps some flat cars. The passenger train which was being made up to leave for Jacksonville, with some freight cars, constituting quite a lengthy train, was lying on the main track, between the Y and the depot. The end of this train was near the bottom of the curve and descent from the Y, and was perhaps not actually seen by Mallard until he was quite near it, coming down at the rate of from three to five miles an hour. His engine struck the rear passenger coach, not doing it very serious injury; but the weight and momentum of his own train drove the tender onto the engine, mashing Mallard, and giving him injuries from which he died in a few moments.

It was the custom to transfer cars at Newberry coming from the south and destined for Jacksonville, and *vice versa*. There were one or more regular trains running from Jacksonville to Newberry and back again. These trains were turned around and made up at Newberry. Extra trains were run between the same points. There was one regular train between Jacksonville and Tyler. Some of the plaintiff's witnesses say that it was customary to leave passenger trains standing over night on the main line near the depot (on the Jacksonville & Southwestern, as we understand it).

The plaintiff introduced in evidence over the objection of the defendant, several rules or regulations of the defendant company, viz.:

"(99) When a train stops or is delayed, under circumstances

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in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail, and planting a lighted fuse on the track, when the conditions require it. The front of a train must be protected in the same way, when necessary, by the fireman.

"(99a) When the speed of a train is reduced, and its rear thereby endangered by a following train before the flagman can get off, a lighted fuse must be thrown upon the track at intervals, until the flagman can get back to protect his train. When a train is to back out of a siding, the flagman must go a sufficient distance to the rear to insure full protection."

"(886) It is their special duty to protect the rear of their trains in accordance with the rules, and they must allow nothing to interfere with the prompt and efficient discharge of this duty."

"(873) They must closely observe other trains and act promptly in the protection of their trains when necessary to do so."

"(105) Yard limits at Jacksonville, Palatka, De Land Junction, Sanford, Oviedo, Orlando, Kissimmee, Lakeland, Winston, Ybor City, Tampa, Port Tampa, Bartow, Punta Gorda, Ft. Myers, High Springs, Du Pont, Live Oak, Ft. White, Gainesville, Rochelle, Ocala, Leesburg, Croom, Juliette, Dunnellon, Inverness, Trilby and St. Augustine, Milldale, Lake Butler and Newberry, will be indicated by signboards marked 'Yard Limit.' Engines have the right to work within the yard limits without special orders. They must keep five minutes off the time of all regular trains, run carefully, and look out for extra trains. Extra trains must approach and run through yard limits carefully, looking out for engines at work. Yard limits are established 2,500 feet north of East Alachua, and extending 2,500 feet south of Burnett's Lake telegraph office, and 2,500 feet north of Burnett's Lake water tank on Newberry Branch, to a point 2,500 feet south of West Alachua. All trains will reduce speed to four miles an hour through these limits, expecting to find other trains flagging in these limits."

The plaintiff also introduced the following definition of "yard" from the rule book of the defendant company, viz.: "A system of tracks within defined limits provided for the making up of trains, storing of cars, and other purposes, over which movements not authorized by time-table or by train order, may be made, subject to prescribed signals and regulations." We think these rules were relevant testimony to the issues made.

The defendant put in evidence rules 105, 106, and 928 from its book of rules, as follows:

"(105) Both conductors and engineers are responsible for the safety of their trains, and, under conditions not provided for by the rules, must take every precaution for their protection.

"(106) In all cases of doubt or uncertainty, the safe course must be taken, and no risks run."

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"(928) They will obey orders of the conductor of the train, in regard to starting, stopping, shifting cars, speed, and general management of the train, unless they endanger the safety of the train, or require violations of the rules."

The defendant undertook to prove by various witnesses and by various questions that as a matter of fact the system of tracks near to and around the depot at Newberry constituted what is known as a railroad "yard," for the switching and transfer of cars and trains from the Jacksonville & Southwestern division to Savannah, Florida & Western division, for making up trains, and for other purposes for which railroad yards are used, and that consequently Mallard knew of these facts, or had opportunity to know them. These questions were either objected to by the plaintiff, and her objections were sustained, or the answers to such questions as were answered were stricken out on motion of the plaintiff. These rulings of the court form the basis of a large number of assignments of error. The following are examples: A witness, O. T. Blitch, was introduced by the defendant, and testified that he was a train conductor with the defendant company on June 2, 1906 (the day of the death of Mallard), and had been such train conductor for three years. He testified that he knew Mallard, who had pulled him a few trips; that the last trip before his death he was with the witness as engineer; that he also acted as engineer of trains under other conductors; that there are yards at Newberry; that it is customary whether there are yard boards there or not, from one switch to the other; that it is known as "Newberry Yards." The following question was asked the witness: "Please state what the yard limits are at Newberry, if you know, and how do you know. Ans. The yard limits there were from one switch—from the side of Savannah, Florida & Western switch over to the Y, and all trains operated from the old Savannah, Florida & Western side to the Y were orders." The plaintiff moved to strike the answer, because, first, it has not been shown legally that there have been any yard limits established and defined, in accordance with the rules of the company; second, the testimony contradicts the printed rules of the company; and, third, it has not been shown that the company has ever established any yard limits or defined them. This motion was granted.

The plaintiff also propounded the following question to the witness Blitch: "Q. Within what distance at Newberry, and between what points, did the tracks lie which were used for storing cars over which movements not authorized by time-table or by train order might be made?" This question was objected to by the defendant "because counsel seeks by his question to establish and define what would be a yard limit indirectly, after the court has ruled that the yard limits have not been proven to have been established and defined by the company." The objection was sustained. The following question was also asked this witness: "Q. Do you know what has been the course of business in storing

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and handling of trains at Newberry, and as to what has been uniformly and generally recognized by the conductors and engineers as constituting the yards at Newberry, since the acquisition by the Coast Line of the Jacksonville & Southwestern?" This question was objected to by the plaintiff because it seeks to establish a custom on the part of this defendant corporation, and it has already been shown by competent testimony that the defendant has printed rules and regulations declaring that the yard limits at this particular point will be indicated by signboards marked "yard limits." "(2) It cannot be shown by the testimony of the conductor of a railroad train that the yard limits have been established or have been defined by the defendant corporation. (3) The testimony is inadmissible, immaterial, and wholly incompetent under the pleadings in this case." Plaintiff's objections were sustained to this question. The following question was asked this witness: "Q. State whether or not, shortly prior to the date of the accident resulting in the death of Mr. Mallard, you had any conversation with Mr. Mallard relating to his knowledge of the extent of the yards at Newberry." This question was objected to by the plaintiff, first, because it has not been shown that the yard limits have been established and defined by the defendant corporation as prescribed by its rules; second, because it seeks to elicit from the witness a conversation with the deceased, his lips being sealed by death, and this suit being a suit between the widow of the deceased and the railroad corporation, and it appearing that this witness is the agent and representative of that corporation, he is disqualified to testify under the statute, as to conversations had with the deceased. This objection was sustained.

The defendant, in the course of the examination of one of its witnesses, viz., W. H. Perry, propounded the following question: "Q. What train were you conductor on at that date [alluding to the date when Mallard was killed]? Ans. The day of the accident I was making up a train with engine 249 in the Newberry Yard. It was not a train at the time of the accident." This answer was objected to by the plaintiff, who moved to strike out the word "yard" at Newberry, because it had not been shown that there was any yard there. This motion was granted.

It is contended by the defendant in error in the brief of her attorneys, and admitted by the plaintiff in error, that the yard limits at Newberry had never been defined by the defendant corporation by the erection of signboards marked "yard limits," embracing the place on the track where the death of Mallard occurred. Under these circumstances, we are to determine whether the court below erred in ruling out the testimony offered by the defendant tending to show that there was as a matter of fact a railroad yard at Newberry, with limits defined by actual use of the various tracks and switches there and the Y west of the crossing, and that engineer Mallard knew of these facts, or ought to have known of them, for if these facts existed, and Mallard knew

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of them, then the rules of the company with reference to his duties in taking precautions for the protection of his train applied, and the proffered testimony tended to support the defendant's pleas. In order to determine this question, we must first determine the issues which were made by the pleadings. The negligence set up in the first count of the declaration is, in substance, that the defendant had left a passenger train lying on the main line near the end of a curve on a steep grade where Mallard could not see it and avoid a collision with it, and the negligence alleged in the second count is that the said train was left on the main line without signals, warning, or guide of any kind to indicate its presence, and that it was because of these alleged acts of negligence that Mallard's engine collided with the passenger train and he was killed. To meet these alleged acts of negligence, the defendant pleaded not guilty, and also special pleas in which it is, in substance, alleged that Mallard's train was an "extra" from Jacksonville to Newberry drawn by engine 249; that it was necessary for said train and engine to use the Y west of Newberry to turn around and head for Jacksonville; that the train was thus turned around and brought back by Mallard on the main track and then left tied up for the night of June 1st; that another train pushed his train and engine back during the night on to the left leg of the Y; that the location of the Y and other tracks of the defendant from the point where engineer Mallard moved his train from the Y to the main track leading to Jacksonville, on the morning of June 2d, up to and beyond the point where the collision occurred, is within the yard limits at Newberry, which fact was well known to Mallard, within which limits it was the duty of Mallard to look out for and afford protection to his own train, and to so handle the same as to render it easily and completely under control, which duty was well known to Mallard; and that notwithstanding he ran his train out of the Y on to the main line at such a rate of speed without making airbrake couplings or connections with which he was provided, and was thus guilty of negligence which caused or contributed to his death; and, in addition the fourth plea, further averred that Mallard failed to take any precautions to protect his own train, as it was his duty to do, but heedlessly and recklessly ran into the train standing on the main line, at a place where, and at a time when, he had reasonable cause to believe that standing trains or other obstructions would be encountered, and thus was guilty of negligence which caused or contributed to his death.

It will be observed that in neither the declaration or pleas was any issue directly made or presented whether the "yard limits" at Newberry had been indicated by signboards marked "yard limits" in accordance with rule 105. The plea alleged the existence of yard limits at Newberry as a fact, but does not allege that those limits were indicated by signboards marked "yard limits"

It is thus seen that the circuit judge, in excluding the proffered

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testimony of the defendant tending to show that there were "yard limits" at Newberry as a matter of fact, tried the case upon the theory of an issue which was not directly made by the pleadings, viz., that no yard limits could be proven in any other way than by signboards marked "yard limits." It is established law in this state that a case must be tried upon the issues tendered and accepted. *Clyde Steamship Co. v. Burrows*, 36 Fla. 121, 18 South. 349; *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 South. 696, headnote 7. The plaintiff accepted the issues tendered by the defendant's pleas, by joining issue on them. This entitled the plaintiff to show, if she could, that the facts set up in said pleas were not true, or to rebut the plaintiff's proof tending to support said pleas, for in the first instance the burden of sustaining the pleas was on the defendant. But we do not understand that she was entitled to avoid the effect of these pleas by proof of new matter—matter not alleged in the declaration and not set up in a replication or new assignment. Our statute, section 1447, Gen. St. 1906, prescribing the effect of a "joinder of issue," says that such joinder shall be deemed a denial of the substance of the plea or other subsequent pleading. Section 1453, Gen. St. 1906, prescribes the form of a joinder of issue, and also the form of a replication to pleas containing new matter, and the form of a new assignment. These sections are taken from the common-law procedure act of 1852. *Day's Common Law Proc. Acts*, pp. 113, 242. In the case of *Green v. Sansom*, 41 Fla. 94, 25 South. 332, this court had occasion to refer to the interpretation of these sections by the English court in *Glover v. Dixon*, 9 Exch. 158. As we understand that case, it was held that these sections do not do away with the necessity for a special replication or new assignment when it is desired to avoid the effect of new matter of defense set up in a plea. This is evident from the fact that the statute provides a form of replication to pleas containing new matter, and also the form of a new assignment. In the instant case, the special pleas set up new matter in defense to the suit, and the joinder of issue thereon simply made an issue upon the truth of this new matter. It did not by its terms seek to avoid the effect of the new matter by any other new matter. For these reasons, we think the court below erred in sustaining the objections to the defendant's testimony.

It may be also observed that the effect of these rulings was to permit the plaintiff to recover upon a ground of negligence not stated or relied on in the declaration, viz., the failure to mark the yard limits with signboards. If the plaintiff intended to claim damages for this reason, there should have been a count in the declaration to that effect. It is established law in this state that the negligence of a defendant affords no ground of action or recovery against him, unless that negligence is alleged in the declaration, and was a proximate cause of the damages sued for. The evidence proffered, taken in connection with that which was admitted, tended to show as a matter of fact that there was a

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railroad yard at Newberry when Mallard was killed; that it consisted of various tracks, switches, and a Y, adjacent to depot grounds where cars and trains were deposited and switched from one track to another, and trains were made up. Where these conditions exist, the courts have considered them as constituting a railroad yard. *Baltimore & O. S. W. Ry. Co. v. Little*, 149 Ind. 167, text 173, 48 N. E. 862, and cases cited. There is nothing in the nature of things, and there is no statute, which forbids that such a yard may have its limits fixed in other ways than by signboards marked "yard limits," so as to make such limits perfectly familiar to the servants and employees of a railroad company whose duties require them to use the yard. Doubtless, it is prudent and proper to mark such limits with such signboards, and it may be negligence in the company not to do so; but we are referred to no law, and we know of none, applicable to this state, which precludes a railroad from proving the actual conditions which constitute a railroad yard, and its actual limits, because it has failed to mark out the limits with signboards as its rules provide shall be done. In some jurisdictions under what are called employer's liability acts, it may be that such omission and negligence would of itself create liability without regard to the question of proximate cause. 2 *Labatt's Master & Servant*, §§ 639 to 652a, inclusive. But we have no such statute in this state, and here the rule is that the negligence sued on must be a proximate cause of the injury or damage. *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558; *Savannah, F. & W. R. Co. v. Cosens*, 46 Fla. 237, 35 South. 398.

It is contended by the defendant in error that rule 105, showing that the yard limits at Newberry would be defined by signboards marked "yard limits," makes such signboards the best evidence of yard limits, and secondary evidence was under the circumstances improper. This would be a correct contention if the defendant had pleaded that the yard limits had been defined in this way and according to this rule 105. But it did not so plead.

One of the objections made by the plaintiff in the court below to evidence proffered by the defendant is that, Mallard being dead, the employees of the defendant corporation could not testify as to conversations and transactions with him relative to his knowledge of conditions at Newberry. It is contended by the plaintiff here that the court did not sustain this particular objection, and that the proffered evidence was excluded on the ground that there were no yard limits at Newberry. The record does not show on what specific ground the plaintiff's objection was sustained. If it was done on the theory advanced here by the plaintiff, we think it was erroneous, for reasons already stated; but, to avoid misapprehension in the future, we deem it best to refer to the fact that this court has heretofore construed section 1505, Gen. St. 1906 (chapter 1983, p. 39, Laws 1874) in the case of *Adams, Adm'r, v. Board of Trustees of Internal Imp. Fund*, 37 Fla. 266, 20 South. 266, and there held that the statute

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did not exclude the evidence of agents of every description by whom business was transacted, but that to be disqualified the witness "must be so interested in the result of the suit as that he would gain or lose directly and immediately thereby, or that the record therein could be used as legal evidence either for or against him in some other suit as an establishment or disestablishment of the matters testified about by him." This seems to settle the question that the employees of a corporation are not disqualified as witnesses for the corporation in a case like the instant one. It was held, in *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148, that in actions for negligence any evidence tending to prove knowledge on the part of the person alleged to have been negligent, of those circumstances and surroundings which enter into the question as to whether such person has failed to exercise proper care is admissible; and except as this doctrine is qualified in a suit brought, like the present one, by the widow of the deceased, in the case of *Jacksonville Electric Co. v. Sloan* (Fla.) 42 South. 516, we think it is applicable to the instant case. In the last-mentioned case, we held that the declarations and admissions of the deceased as to his physical condition shortly before his death, and not a part of the *res gestæ*, could not be proved in a suit for damages by the widow. We understand this doctrine as resting on the rule that declarations and admissions, while hearsay evidence, are admitted as being against the interest of the party who makes them, and who may be presumed not to have admitted anything against his interest, which was not true; but, where the widow sues for damages for the death of her husband, under the statute, it is not the husband's interests which would be affected by his admissions, but the widow's statutory interest, and therefore his admissions are hearsay and incompetent.

There are other assignments of error; but, inasmuch as we think this case was tried on an incorrect theory of the issues made by the pleadings, and the assigned errors are probably referable to this incorrect theory, it is not likely they will occur again, and it is therefore not necessary to give them extended notice.

The judgment of the circuit court is reversed, and a new trial awarded.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITEFIELD, JJ., concur in the opinion.

ELIOT *v.* KANSAS CITY, FT. S. & M. R. CO.

(Supreme Court of Missouri, Division No. 2, April 2, 1907.)

[102 S. W. Rep. 552.]

Appeal—Abstracts of Record—Matters Included.—Under Rev. St. 1889, § 2253 [Ann. St. 1906, p. 783], requiring the filing of an abstract of the entire record, it is not necessary that the abstract contain the certificate of the clerk nor the various matters of the record in full.

Same—Additional Abstract.—When a bill of exceptions is signed and filed, the matter therein becomes matter of record, and where the abstract shows that the bill was duly filed, and states what the record shows, it is conclusive, unless the opposite party files a counter abstract showing the contrary.

Same—Effect.—Where a party files an additional abstract to supply matters omitted in the original abstract, he waives any other objection to it than as indicated in the additional abstract.

Master and Servant—Duty of Master to Furnish Suitable Instrumentalities—Presumptions.—In an action against a master for injuries to a servant, the presumption is that the master has discharged his duty towards the servant by providing him with suitable instrumentalities, but, if it be shown that they were defective, the presumption is that the servant had no knowledge of it and was not negligently ignorant of it.

Same*.—The mere fact that a servant was injured in the act of throwing a switch lever did not of itself overcome the presumption that the master had discharged its duty towards him to furnish suitable instrumentalities, nor did it amount to proof of a failure by the master to perform its duty.

Same—Contributory Negligence.—A switchman in full control of a switch, and with authority to control by signal the movements of engines using it, who allowed an engine to come so close to the switch that he did not have time to complete the act of turning the lever before the engine had passed the switch, and struck his hand which was upon the partly turned lever, was guilty of contributory negligence.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Fannie E. Eliot against the Kansas City, Ft. Scott & Memphis Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

*For the authorities in this series on the question whether a presumption of negligence on the part of the master or his representative arises from the fact that one of his servants is injured, see footnotes appended to *Cederberg v. Minneapolis, etc., Ry. Co. (Minn.)*, 23 R. R. R. 98, 46 Am. & Eng. R. Cas., N. S., 98.

Eliot v. Kansas City, etc., R. Co.

L. F. Parker and I. P. Dana, for appellant.

W. T. Jamison, and Walsh & Morrison, for respondent.

BURGESS, J. Plaintiff, the widow of B. F. Eliot, sues for \$5,000, damages for the death of her husband, who on the 27th day of May, 1901, while in the employ of and acting as switchman for defendant, and in the performance of his duties as such, in the yards of defendant in Kansas City, was struck and injured on the back of his hand by one of defendant's engines, from the results of which injury and other "matters and things" set forth in the petition the said B. F. Eliot on the 17th day of July, 1901, died. The trial resulted in a verdict and judgment for \$5,000 in favor of the plaintiff. In due time defendant filed motions for a new trial and in arrest, which were overruled, and defendant appealed. The suit was originally instituted against the Kansas City, Ft. Scott & Memphis Railroad Company, appellant herein, and the St. Louis & San Francisco Railroad Company, but was subsequently dismissed as to the latter.

The petition alleges the incorporation of the defendant, and that on May 27, 1901, Benjamin F. Eliot, the husband of plaintiff, was in the employ of the defendant, and in such employ was acting as a switchman at a point on the tracks of the defendant near Twenty-Fifth street and State Line in Kansas City, Mo.; that, while in the discharge of his duties as such switchman upon said day, plaintiff's husband, while adjusting and operating a switch at said Twenty-Fifth street and State Line, and while pushing or turning over the lever to operate said switch, which was necessary to enable an approaching engine belonging to the defendant to switch upon and run over and upon the proper track, and while said engine was being run, operated, and controlled by the engineer thereof, who was an employee of defendant, his hand while still grasping said switch lever was struck by said engine and thereby severely wounded, lacerated, torn, and bruised at and about a point on the back thereof, immediately above the joint where the index finger is joined to the hand, and thereby the said index finger was almost severed from the said hand. "Plaintiff further states that the said injury to the hand of the said Eliot was caused as aforesaid by the carelessness and negligence of the defendant, the Kansas City, Ft. Scott & Memphis Railroad Company, in so constructing and arranging the said switch lever and the said engine and its attachments that, when operated as aforesaid, they came so close together, as to cause the injury as above stated. Plaintiff states that the said Benjamin F. Eliot had a long and continuous illness caused from the aforesaid injury, extending from the time of the said accident until on or about the 17th day of July, A. D. 1901, from which injury and illness his life was in imminent peril and danger, and as a result of such injury it became necessary to perform a surgical operation upon the said hand in an effort to heal and cure the said injury, and, in order to save his life, and as a necessary incident to the performing of the said operation, the physicians and

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surgeons in attendance upon him administered to him an anæsthetic, and while under the influence of said anæsthetic, administered for the purpose aforesaid, and before the said operation could be completed, the said Eliot died, his death being caused on account of the matters and things hereinbefore set forth." It was further alleged that the St. Louis & San Francisco Railroad Company was liable for the debts of the Kansas City, Ft. Scott & Memphis Railroad Company and judgment was prayed against both defendants in the sum of \$5,000. The last-named defendant demurred on the ground that it was not a necessary party to the suit, and that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court and defendant saved an exception to the ruling.

The answer of defendant consisted of, first, a general denial; second, a general plea of contributory negligence; third, a general plea of assumption of risk. Plaintiff's reply was a general denial of the allegations of the answer.

The only testimony in the case was that introduced by plaintiff, the defendant not offering any, and the only witness who was present at the time and place of the accident was H. P. Wells, foreman on the switch engine which, it is alleged, struck and injured Eliot. Wells testified by deposition, which was read on behalf of plaintiff at the trial. The deceased was an experienced switchman, 45 years of age, and when hurt he was attempting to "throw a switch" in front of an engine which was switching cars, and while so doing his hand in some way was caught between some part of the engine and the switch lever, and thereby lacerated and injured. According to Wells' testimony, he was sitting on the left-hand side of the cab of the engine, going north, at the time Eliot was hurt. The switch stand was on the west side of the track. South of the switch there was only one track, but north thereof there were two tracks, with either of which the south track could be connected by properly moving the switch lever; the movement being called "throwing the switch." The westerly track led to the main line, while the easterly track was called the "Milwaukee connection." The switch engine had been employed in the yards and in the vicinity of the said switch, with the same crew, all the forenoon. Immediately before the accident the engine had gone over this switch upon the Milwaukee connection and coupled up to some cars standing thereon, and then backed over the same switch until the engine and cars were south thereof. The engine then started rapidly north, and, when it was close to the switch, the cars were uncoupled, and they proceeded with the impetus given them over the switch and to the west track. It would appear that when the cars, which were moving rapidly, were ahead of the engine about half a car length, or 18 feet, and before the engine had yet reached the switch Eliot attempted to throw the switch between the engine and said cars; the object being to let the engine in on the Milwaukee connection without stopping. At the time he attempted to do this

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the engine was about six feet south of him, and still moving rapidly. Before the operation of moving the switch handle or lever was completed, and while said lever was pointing in a horizontal direction towards the track, the engine passed, and some projecting attachment on the engine struck the hand of Eliot which had hold of the end of the lever. Eliot held up his bleeding hand, and at a signal from fireman Wells the engine was stopped. The hand was injured on the back; the tendons of the index finger above the knuckle being torn apart. There was a blow-off pipe on the engine just behind the pilot beam, and in a position somewhat lower than the beam. Witness Wells measured the space between the blow-off pipe and the switch lever, when each was opposite the other, and found the space was about an inch, which he said was not sufficient for a man's hand. He was asked if the way Eliot threw the switch was not the usual and ordinary way under such circumstances, and he stated that he had seen it done before, and whenever there was an occasion of that kind. Witness John W. O'Neil, an experienced switchman, testified that the operation of switching cars from one track to another and "throwing the switch" was about the same in all yards. He said that he knew the switch stand in question, having worked in defendant's yards prior to May 27, 1901. On cross-examination he stated there would be room enough to throw the switch although the engine was only six feet away from the switch stand at the time, as it took but a second to do so; that the switch is not completed until the lever is down, but that an engine can go over the switch before it is quite down.

After the accident Eliot was taken home in an ambulance, and the same afternoon he returned to the railroad yards to get some things which he had left there. He stayed at home some 10 days, and then went to the hospital, where he remained about four weeks, coming home occasionally. At the end of that period he went home, and remained there until the morning of July 17th. The evening before his family physician, Dr. Van Eman, was at his house examining his hand, and next morning Eliot went to the hospital to meet him and other physicians who were to hold a consultation there. No witness saw Eliot alive after he left home that morning, nor did the plaintiff ever see him again, even after he was dead; her testimony in that regard being "it was just best that I should not see him."

Dr. Moses T. Runnels testified that he made a superficial examination of the body of Eliot on the afternoon of July 18, 1901, in the presence of Dr. Van Eman, and a doctor from the Ft. Scott & Memphis Hospital, and some friends of the deceased. The purpose of the physicians and surgeons was to make a post mortem examination, but the body was in such a state of decomposition at the time that it was thought inadvisable to enter into it. He stated that it was very evident that there had been a decomposition or state of gangrene in the body before

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the man died, caused by blood poisoning. The right hand and arm indicated that they were in a state of decomposition before he died, the hand being black, and the arm, extending clear to the shoulder, being black and very much swollen. Over the metacarpal bone of the index finger, about an inch above the knuckle, there was a cut or open place in the hand, from which both ends of the severed tendon protruded. The glands under the arm were very large, showing that there had been infection and blood poison; that the condition was in itself a sufficient cause of death. Dr. Runnels stated that, where a man was affected with blood poisoning to the extent that Eliot apparently was, the only thing to do would be to operate upon him, and that such operation would necessitate the use of chloroform or ether. The testimony further showed that Dr. Van Eman was an eminent physician, and that he died before the trial of this case. There was no testimony as to where deceased was between the morning of July 17th and the afternoon of July 18, 1901, what he did or what was done to him, nor was there any testimony offered as to where or when or under what circumstances he died.

Not being satisfied with appellant's abstract, plaintiff filed an additional abstract which has reference solely to the motions filed by the defendant to strike out, and to make more definite and certain her petition, which motions were overruled by the court, but no bill of exceptions was filed during the term at which these rulings were made, and no point is made by defendant upon the action of the court in overruling said motions for that reason. Besides, they were expressly abandoned by the appellant on this appeal. They are therefore not before us for consideration, and it was wholly unnecessary for defendant to mention them in its abstract. As was said in *Lumber Company v. Stepp*, 157 Mo. 366, 57 S. W. 1059: "The statute of this state (section 2253, Revised Statutes of 1889 [Ann. St. 1906, p. 783]), requires appellant to file a certified copy of the judgment and the order granting the appeal, and then devolves upon him to make an abstract of the record and deliver a copy to the opposite party in the time required by the rules of the court. The abstract, we have consistently ruled, does not require the certificate of the clerk nor the various matters of the record in full. *Ricketts v. Hart*, 150 Mo. 64, 51 S. W. 825; *McDonald & Co. v. Hoover*, 142 Mo. 484, 44 S. W. 334. The purpose of the statute was to avoid unnecessary cost, and to encourage concise statements of the record. Moreover, it provided within itself a method to prevent imposition on this court by requiring respondent, if dissatisfied, to file an additional abstract within a certain time, and, if the parties could not concur as to the record, the clerk should certify to this court so much of the record as is in dispute. When a bill of exceptions is signed and filed, the matter therein becomes matter of record. When, therefore, as in this case, the abstract shows the bill was duly filed, and then proceeds to state what the

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record shows, it is conclusive, unless the respondent files a counter abstract as required by our rules. No such thing has been done in this case. The abstract is unusually full and complete, and is not open to the attack made upon it for the first time in the brief." Plaintiff, in filing an additional abstract to supply matters omitted in defendant's abstract, must be considered as having waived any other objection to it than as indicated in the additional abstract; and, as the abstract shows that the bill of exceptions was duly filed and also states what the record shows, it is conclusive, in the absence of a counter abstract showing to the contrary. *Lumber Company v. Stepp, supra*; *Martin v. Castle*, 182 Mo. 216, 81 S. W. 426.

In *Flannery v. Kansas City, St. J. & C. B. Ry. Co.*, 97 Mo. 192, 10 S. W. 894, it is held that, when a respondent or defendant in error does not file an additional abstract, the appellate court will accept that of appellant or plaintiff in error as containing a correct statement of the record and will not go behind the abstract. In *McDonald & Co. v. Hoover*, 142 Mo. 484, 44 S. W. 334, it is held that an abstract like the one in question is conclusively presumed to be true unless challenged by a counter abstract, as provided by section 813, Rev. St. 1889 [Ann. St. 1906, p. 783], and "that nothing more is required in an abstract than a recital of the substance of the various entries. In this case appellant's abstract recites the leave to file and the several extensions, and the time of granting each, and the length of time and the filing thereof. This is all the statute requires." The same rule is announced in *Ricketts v. Hart*, 150 Mo. 64, 51 S. W. 825. So, in the case at bar, appellant's abstract recites the leave to file and the several extensions, and the time of granting each, as well as the length of time and the filing thereof. This is all that the statute requires.

Defendant introduced no testimony, but at the close of all the evidence introduced by plaintiff defendant demurred thereto for the reason, as stated, that plaintiff had not shown facts sufficient to constitute a cause of action against the defendant. The demurrer was overruled, and defendant excepted.

In cases of this character the presumption is that the master has discharged his duty towards his employee or servant by providing him with suitable instrumentalities with which to work, and, if it be shown that they were defective, then there is a further presumption that the employee had no notice or knowledge of this fact, and was not negligently ignorant of it. 4 Thompson's Commentaries on the Law of Negligence (2d Ed.) § 3864. The master is entitled to the benefit of the presumption that he has performed his duty until the contrary appears (*Boyd v. Blumenthal & Co.*, 3 Pennewill [Del.] 564, 52 Atl. 330), and it devolved upon the plaintiff in this case to show by the preponderance of the evidence that defendant had failed to perform its duty in this respect, in consequence of which her husband sustained injuries from which he died (*Pennsylvania Company v. Whitcomb*, 111 Ind.

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212, 12 N. E. 380; *Pellerin v. International Paper Co.*, 96 Me. 388, 52 Atl. 842; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; 4 *Thomp. Com. Law of Negligence* [2d Ed.] § 3866). In *Cahill v. Hilton*, *supra*, it is said: "A master's liability to his servant for injuries received in the course of his employment is based upon the personal negligence of his employer; and the evidence must establish personal fault on his part, or what is equivalent thereto, to justify a verdict; and he is entitled to the benefit of the presumption that he has performed his duty until the contrary appears." *Wood on Master & Servant*, §§ 345, 346. Moreover, in order to entitle plaintiff to recover, it devolved upon her to not only overcome by testimony the presumption to be indulged in favor of defendant that it performed its duty towards plaintiff's husband, but that defendant was negligent as charged in the petition, that such negligence was the proximate cause of the injury, and that said injury caused the death of her husband as alleged. And the fact that the hand of plaintiff's husband was hurt while in the act of throwing the switch lever as the engine was passing upon the track (even if it was struck by the engine, as charged in the petition) did not of itself overcome the presumption that defendant had discharged its duty towards him with reference both to the switch lever and engine, nor amount to proof of a failure by defendant to perform its duty. In *Jones v. Railroad*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434, Judge Valliant, speaking for the court, said: "Proof, therefore, of the mere fact that the servant was injured in the master's service is not sufficient to make out a prima facie case for the plaintiff"; citing *Yarnell v. Railroad*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Murphy v. Railroad*, 115 Mo. 111, 21 S. W. 862. See, also, *Hornstein v. United Railways Co.*, 195 Mo. 440, 92 S. W. 884, 4 L. R. A. (N. S.) 729.

While in this case the blowpipe on the engine, which the evidence tends to show contributed to the injury, was located in an unusual place, being about two inches back of the pilot beam and extending down about five inches below the end of the beam, while the customary and usual place for the location of such pipe is either immediately before or behind the drive wheel, there was no evidence tending to show that it was of improper or defective construction, or that it was the direct cause of the injury. Deceased had not completed the movement of throwing the switch at the time of the accident. In order to throw the switch back from the westerly track and connect with the other track, or Milwaukee connection, it was necessary for the switchman to raise the switch lever from a vertical position to a horizontal position, turn it in a horizontal plane from the south to the east side of the stand, and then push the handle or lever down to a vertical position and into a notch on the east side; but at the time the front part of the engine crossed the switch the switch lever was pointing horizontally toward the engine instead of being pushed down to a vertical position, as it would if the movement

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of throwing the switch had been completed. The space between the extreme end of the switch lever and the blowpipe of the engine was about an inch in this case, but, had the movement of throwing the switch been completed and the lever in its proper position, the space between the lever and the blowpipe would have been about 15 inches, or the length of the said lever. While there was no evidence that it was absolutely necessary to have the lever down in the notch before the engine could go over the switch in safety, that was the safest and best way, in order to allow the engine to pass. There was nothing to show that the blowpipe on the engine was located in an unusual place or projected further than it should. It is obvious that the height above the level of a rail of the projecting end of a switch lever would vary with the location of the switch stand and the grade of the ground, so that while the blowpipe on an engine might come opposite the end of one switch lever, as it pointed toward the track, it might never come opposite another. They have no connection with each other in any case, for when the lever was where it should be, as an engine passed it was in a vertical position and hung close to the switch stand.

The testimony showed that the deceased was in full charge and control of the switch at the time of the accident, and that he had authority to control the engine's movements by signal at any time, so that he could, by a motion of his hand, have had it stopped or slowed down. He had thrown the switch and turned the lever a few minutes before when the engine and cars moved south, and had thrown the lever down into the notch on the side of the stand, as was necessary before the act was completed and before it was naturally safe for the engine or cars to pass over. When he attempted to throw the switch this time, the engine, moving somewhat rapidly, was only six feet away. The fireman testified that he thought they were not going to make the switch, and he gave the engineer a signal to stop. The engineer then stopped the engine, but not until a portion of it had passed the switch. It is clearly shown by the evidence that Eliot's hand was injured because he had not completed the throwing of the switch, which was necessary for his safety and that of the engine and men on it, before the engine reached the connection of the tracks, and that the switch lever, when in proper position, cleared all parts of moving cars and engines by a safe margin. If it had not, there would have been a good claim of negligence against defendant. With the lever extended, which was an improper position in which to hold it, and one for which it was never intended at the time the engine and cars were passing, the lever handle came close to the whole engine, the evidence showing that in this position it was about five inches from the pilot beam, and about an inch from the blowpipe. It might have been equally near other parts of the engine. It was obvious that the switch lever, when so extended towards the track, came so near an engine or cars moving past as to plainly warn a man not to get any part of his

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body between. It was a clear day about noon, and the entire situation was plainly visible. Eliot had thrown the switch at least once just before this occurrence. He had an appliance which, when used as it was intended to be used, and as he had used it before, was perfectly suitable. He was master of the situation, and could use it that way if he chose. So much is indisputable. True Eliot's hand was hurt, and apparently by coming in contact with some part of the engine; but the cause of the injury was his voluntary attempt to do something which there was not sufficient time for him to complete, thereby making an improper use of the lever. Is it just that the employer should bear the result of his act, which would appear to have been a mistake of judgment on his part?

The grounds of negligence alleged in the petition are the carelessness and negligence of the defendant, the Kansas City, Ft. Scott & Memphis Railroad Company, in so constructing and arranging the said switch lever and the said engine and its attachments that, when operated as aforesaid, they came so close together as to cause the injury. There was no evidence tending to show that the switch lever was not of proper construction, but there was evidence tending to show that the blow-off pipe on the engine was not in the usual place of such pipes, and that it extended down too low, in consequence of which, and the failure of deceased to throw the switch before the engine reached it, the blow-off pipe came in contact with his hand at the end of the lever, causing the injury to deceased. Eliot, however, was free to act as he chose. By a motion of his hand he could have the engine slowed up or stopped, and thus have avoided the injury; but of his own volition he undertook to lift the lever and swing it around towards the track, when the engine was too close for him to complete or effect his object. Had he taken more time, as he might have done, and signaled the engine to stop or slow up, or had he not extended his hand beyond the end of the switch lever, he would not have been hurt. It is obvious, from the facts, that the injury to the hand of deceased was not the result of any negligence on the part of the defendant, but of his own carelessness in attempting to throw the switch under the circumstances, and in placing his hand over the end of the lever when there was no necessity therefor.

Plaintiff cites and relies upon a number of decisions of this and other courts, among which may be cited *Flanders v. C., St. P., M. & O. Ry. Co.*, 51 Minn. 193, 53 N. W. 544; *Murphy v. Wabash Ry. Co.*, 115 Mo. 111, 21 S. W. 862; *Charlton v. St. Louis & San Francisco R. R. Co.* (Mo. Sup.) 98 S. W. 529, and kindred cases, which hold that when obstacles are placed, or permitted to remain, so near a railroad track that servants of the road while in the discharge of their duties come in contact with them and are injured, the railroad company will be liable therefor. But the case at bar is not of that character. In none of those cases had the injured servant control of the movement of the

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engine or cars, or of the thing which caused the injury, while in this case the servant had such control, and especially of the switch lever. It is not alleged that the switch stand was so near the track as to render it dangerous to employees, but the gravamen of the complaint is defendant's negligence in so construing and arranging the said switch lever and the engine and its attachments that, when operated, they came so close together as to cause the injury. But even if defendant was guilty of negligence in constructing and arranging said switch lever, engine, and attachments, which we by no means concede, the deceased was unquestionably guilty of carelessness and negligence in manipulating the lever under the circumstances. We find that the negligence of deceased contributed directly to his injury, which precludes recovery by plaintiff in this action.

The judgment is, therefore, reversed. All concur.

FT. WAYNE & WABASH VALLEY TRACTION CO. v. CROSBIE.

(Supreme Court of Indiana, May 28, 1907.)

[81 N. E. Rep. 474.]

Master and Servant—Injury to Servant—Action—Pleading.—Where, in an action for injury to a servant, several acts of negligence are sufficiently alleged, recovery will be justified on proof of injury resulting from one or more negligent acts.

Same—Fellow Servant's Negligence—Master's Liability.—Where, through overwork and loss of sleep, a motorman failed to observe a rule requiring him to keep 100 feet behind a preceding car, and collided with it, injuring plaintiff, the motorman thereof, the company may not interpose his non-compliance with the rule as a fellow servant's negligence, barring plaintiff's recovery.

Evidence—Res Gestæ—Admissibility.*—Where a street car superintendent placed a motorman on a car about 10 o'clock a. m., and about 4:30 o'clock p. m. the motorman caused a collision, resulting in plaintiff's injury, and the cars were run four miles to another point, where the superintendent came up while employees were stating how

*For the authorities in this series on the question when the declarations of railroad employees are, and are not, *res gestæ* in actions against their respective companies, see foot-notes appended to *Robinson v. Old Colony St. Ry. Co.* (Mass.), 21 R. R. R. 860, 44 Am. & Eng. R. Cas., N. S., 860; foot-notes appended to *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 20 R. R. R. 631, 43 Am. & Eng. R. Cas., N. S., 631; foot-notes appended to *Lexington St. Ry. Co. v. Strader* (Ky.), 20 R. R. R. 273, 43 Am. & Eng. R. Cas., N. S., 273; foot-notes appended to *Wallace v. North Alabama Trac. Co.* (Ala.), 19 R. R. R. 804, 42 Am. & Eng. R. Cas., N. S., 804; *Leach v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 212, 42 Am. & Eng. R. Cas., N. S., 212.

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the accident occurred, his declaration that he should have known better than to put the motorman on the car was inadmissible as part of the *res gestæ*.

Appeal from Circuit Court, Clinton County; L. C. Merritt, Judge.

Action by the Ft. Wayne & Wabash Valley Traction Company against Mason J. Crosbie. Judgment for plaintiff, and defendant appeals; the appeal being transferred from the Appellate Court. Reversed and remanded.

Kumler & Gaylord, for appellant.

JORDAN, J. This appeal was transferred from the Appellate to the Supreme Court under the authority of section 2 of a statute of the Legislature in force March 9, 1907 (Acts 1907, p. 237, c. 148). The action was instituted by appellee in the Tippecanoe circuit court to recover damages due to the alleged negligence of appellant company, while he was in its employ in the capacity of motorman on one of its electric cars. The cause was venued to the Clinton circuit court, wherein, upon the issues joined upon the complaint by the general denial, there was a trial by jury and a general verdict returned in favor of appellee, assessing his damages at \$6,500. Along with the general verdict, the jury returned answers to a series of interrogatories. A motion for judgment on the latter in favor of appellant was denied, as was also a motion for a new trial, and judgment was rendered upon the verdict. The errors assigned and argued by appellant's counsel are based on the overruling of each of the aforesaid motions.

The complaint, among other things, alleges that on and prior to the 4th day of July, 1903, defendant company owned, controlled, and operated a certain electric street railway system in and upon certain streets of the city of La Fayette, Tippecanoe county, Ind., and the town of West La Fayette, in said county. One of its lines extended to a pleasure resort about four miles from the city of La Fayette, known as "Tecumseh Trail." This last-named line was and is known as the Soldiers' Home Line." Said street railway system was duly equipped with electric street cars used by defendant company in the transportation of passengers by means of electricity, and the defendant was on said day and date, and now is, and ever since has been, a common carrier of passengers. In operating said electric street railway system and the cars run thereon, it became, and was on the day aforesaid necessary for defendant company to hire, employ, and keep in its service a large number of men, such as conductors and other persons skilled in running and operating electric street cars commonly known as "motormen." On said 4th day of July great numbers of passengers were carried and transported over the Soldiers' Home Line and other lines of the defendant company's system, and in the performance of these services as motorman on said day it required greater care, skill, and attention on

the part of each motorman in the employ of the company and in the performance of the duties of motorman to avoid accident in making the time required by defendant company in the operation of its cars over said system, than on ordinary days, when passenger traffic was not so heavy. Prior to said day and date aforesaid mentioned the company had in its employ one William Stanley, who, under such employment, worked at night in and about defendant's barns, keeping its cars in running condition, and doing such other manual labor as was required of him, etc. That said Stanley, as such employee and servant, as aforesaid, was on duty the entire night of July 3, 1903, until about 10 o'clock of the 4th day of said month, at which time he was ordered and directed by defendant company to prepare himself for work during the remainder of said day as a motorman on one of the street cars of defendant company. Said Stanley, on the day and date last aforesaid, "was inexperienced in the running and handling of an electric street car, having had but little experience in the handling and operating of such cars as a motorman, and by reason of said inexperience he was unfit and an improper person to be trusted with the handling of said car, and especially on a day when large crowds were to be hauled and carried, when it was necessary to exercise greater care and caution in the handling of such car than on ordinary occasions, all of which defendant company well knew and had full knowledge," etc. Notwithstanding the inexperience of said Stanley, as aforesaid stated, and notwithstanding the fact that he had been at work in the employ of defendant company on duty, as aforesaid alleged, the entire night of July 3, 1903, and continuously until about 10 o'clock of the day following, said defendant company, well knowing all of said facts, and well knowing the fact that said William Stanley, by reason of overwork and the loss of sleep, was an unfit person at said time to be intrusted with the handling and operating of a street car on defendant company's line as a motorman, "carelessly and negligently placed him in charge of one of its electric street cars as such motorman at about 11 o'clock a. m. on said 4th day of July, 1903, and started him over its line and system in charge of said car as such motorman, and carelessly and negligently continued him in such service without rest or intermission until about 4 o'clock p. m. on said day, when the injury and accident to plaintiff hereinafter set forth and complained of occurred."

The car which plaintiff was operating as a motorman on the day aforesaid, at the time of the accident, was an open one, having a drop curtain which rendered it impossible for him to see the rear of his car or to observe the track of the road in the rear of his car. While in the discharge of his duty on the afternoon of said day as a motorman on the electric street car under his charge, and while running the same over the defendant's Soldiers' Home Line from the city of La Fayette to said "Tecumseh Trail," he was signaled and required to stop for the purpose of discharging and receiving passengers. In obedience to such signal and order

he stopped his car for such purpose. While the car was standing still for the purpose aforesaid, without notice or warning, and without any knowledge of the approach from the rear on said track of an electric car, said William Stanley ran the electric car of defendant, on which he was then and there working and operating as such motorman, against and into the rear end of the car on which plaintiff was working, as aforesaid. Said car was run at a high and dangerous rate of speed, to wit, 10 to 12 miles an hour, with such force, power, and violence as to knock plaintiff down and throw him backwards over, upon, and against certain of the seats of the car on which he was working, with such force and violence, by reason of which he was seriously injured, etc. The complaint further charges that "by reason of the loss of sleep as aforesaid and of overwork as aforesaid, and being up the entire night previous to the injury to plaintiff as aforesaid, that said William Stanley was not in a fit condition either physically or mentally to be intrusted with the handling of the electric car of defendant company then in his charge as motorman; all of which the defendant company well knew, and at the time of placing said Stanley in charge of said car as aforesaid had full knowledge, and was possessed of such knowledge prior to the accident and injury to plaintiff above set forth." Plaintiff further charges that "the injury to him hereinbefore referred to was caused by and resulted from the carelessness and negligence of said defendant company in carelessly and negligently placing said Stanley in charge of the electric car on which he, said Stanley, was working as a motorman at the time of the accident as aforesaid, and at a time when said Stanley was inexperienced in the handling of an electric car as such motorman, as aforesaid, and while said Stanley was unfit to perform the service as motorman by reason of overwork and loss of sleep as aforesaid, and through the carelessness and negligence of said defendant company in permitting said Stanley to have charge of said car as such motorman whilst it (defendant company) well knew and had full knowledge of the inexperience of said Stanley to perform such services as motorman and of his inexperience in handling and operating an electric car, and by and through the carelessness and negligence of said defendant company in carelessly and negligently allowing, suffering, and permitting him (Stanley) to be and remain in charge of such car as such motorman continuously from the time such car was placed in his hands on the 4th day of July, 1903, until the happening of the accident about 4 o'clock p. m. on said day, without rest, sleep, or intermission," which, as alleged, wholly incapacitated him for services as a motorman on the day aforesaid, and of all of which defendant company had knowledge.

Counsel for appellant argue that the complaint, under the facts therein, charges "two act of negligence, viz.: First knowingly placing the motorman Stanley in charge of the electric car causing the injury at a time when he was inexperienced in the

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handling of an electric car; second, knowingly placing said motorman in charge of said car whilst he was unfit to perform the services of a motorman by reason of overwork and loss of sleep. And also charges that the injury to appellee was caused by the combined effects of said two acts of negligence." It is therefore insisted that, said two acts of negligence having been charged as jointly constituting the proximate cause of appellee's injury, the record must show that they both contributed to said injury. The argument is further advanced that, inasmuch as the jury in the answers to interrogatories "find that the collision was caused by the omission of Stanley to observe a known rule, i. e., by his carelessness, and not from his alleged inexperience in handling an electric car," one of said two acts of negligence constituting the alleged proximate cause of appellee's injury has necessarily been found by the jury not to have contributed thereto; and judgment should have been given in favor of appellant.

It is true that, according to the decisions in *Terre Haute, etc., Co. v. Jones*, 33 Ind. App. 333, 336, 71 N. E. 275, in a case in *R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62, and *Southern Ry. v. Chicago, etc., R. Co. v. Barnes*, 164 Ind. 143, 149, 73 N. E. 91, and authorities there cited. It is difficult to determine from the complaint whether the pleader intends to combine the two acts of negligence therein averred, and as thus united predicate appellee's right of action thereon or whether he intended in drafting the pleading to separately set up each act or ground of negligence as a cause of action, under the rule asserted in the *Barnes Case supra*. It is true that appellant company, at and prior to the accident in controversy, had a printed rule, of which Stanley, the motorman, had knowledge prior to the collision in question. This rule provided that, when two cars were following each other, the motorman of the rear car should keep in the rear of the first car at least 100 feet, in order that he might have room to stop his car in the event the first car should suddenly stop to take on or let off passengers, or for any other reason. The jury found in its answers to interrogatories that Stanley did not obey or observe this rule at the time of the accident, but further found that his violation or nonobservance thereof resulted from his overwork by appellant and loss of sleep, and that by reason of such overwork and loss of sleep he was, on the day of the collision, in an unfit condition to be intrusted with the handling of an electric car on defendant's road, and that the defendant knew

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of his loss of sleep at the time it placed him in charge of the car on the forenoon of the day on which the accident occurred. By other answers to interrogatories the jury further found that Stanley, at the time plaintiff received his injuries, was inexperienced in running and handling electric cars, of which fact the defendant had knowledge. It is also further found that the collision of the two cars in question was caused by reason of the inexperience of Stanley, the motorman, in the handling and operating of electric cars, and by reason of his being an unfit person on account of his overwork and loss of sleep to handle and operate an electric car. The jury also found that the car in charge of Stanley, and the one which collided with the car upon which plaintiff was working, and thereby injuring him, could have been stopped and the collision prevented had it at the time of the accident been 100 feet in the rear of the car operated by plaintiff. Counsel for appellant insist that by this finding, and the further finding that Stanley knew of the existence of the rule, it is manifest that the cause of the collision which resulted in the injury to appellee was the omission of Stanley, a fellow servant of appellee, to observe the rule of appellant company, which required said motorman of the following car to keep 100 feet in the rear. It is true that, under this special finding of the jury, Stanley, as shown, did not comply with the rule of the company; but the jury further found, as shown, that his omission to observe the rule in question was not the result of his negligence, but the result of his overwork and loss of sleep. Appellant company, having placed him in charge of the car as motorman at a time, when, as shown, it knew he was overworked and had gone without sleep or rest for 24 hours and over, ought to have known that under the circumstances he was not in condition to properly exercise the faculties or senses with which he was endowed. Having placed him in charge of the car in his unfit condition because of his overwork and loss of sleep, appellant is not in a position, under the circumstances, to successfully interpose his noncompliance with the rule in question in order to exempt itself from liability in this action. *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104; *Republic Iron, etc., Co. v. Ohler*, 161 Ind. 393, 68 N. E. 901. In this latter case we said: "It is not reasonable to assert that a man who has labored continuously for a period of 48 hours without sleep, or for even a much shorter time, is in his normal condition, or that he, under the circumstances, can properly exercise all of the faculties or senses with which he is endowed. The law of nature is inexorable in its demands. The cravings of hunger and nature's demand for sleep or rest must have consideration. A human being deprived of sleep for the period which appellee was becomes dull in intellect and apprehension, and necessarily must be more or less unmindful of his surroundings." The answers of the jury to the interrogatories afford no grounds for appellant to demand judgment in its favor over the general verdict.

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It appears that the collision in which appellee was injured occurred about 4:30 o'clock on the afternoon of July 4, 1903, while the car operated by Stanley as motorman and the one operated by appellee were running from the city of La Fayette to the "Tecumseh Trail." The point where the collision happened was four miles from La Fayette. Some time after the collision the two colliding cars were run ahead for some distance, but were finally coupled together and run to the public square in the city of La Fayette. While the cars were at the later point, Charles Fansler, superintendent of appellant's company, came up to the cars. Some of appellant's employees were giving a statement in respect to how the accident or collision in question occurred. O. B. Whisenand, a witness on behalf of appellee, was permitted by the court to testify that Fansler, the superintendent, at that time and place made the declaration that "he (Fansler) should have known better than to have put Mr. Stanley (the motorman) on the car." This evidence went to the jury over the objection and exceptions of appellant. The latter also unsuccessfully moved the court to strike out the evidence and withdraw it from the consideration of the jury. That this declaration of Fansler, the superintendent, under the circumstances, was inadmissible as evidence to sustain the issue on the part of appellee, is manifest. It was made by Fansler long after the occurrence of the collision or accident by which appellee was injured, and some four miles away from the place where the accident happened. It was no part of the *res gestæ*, nor was it made within the scope of Fansler's duty as the agent of appellant. It appears that Fansler, on the forenoon of the day on which the accident occurred, but long prior thereto, placed Stanley in charge of the car in question to operate it as a motorman, and the declaration in question referred to that time. It related to a matter which had occurred before the collision and at a different time and place. It may be said to have been a combination of a matter in the past with the opinion of Fansler as to what he ought not to have done. In its effect it was an admission by him that he had done wrong in placing Stanley in charge of the car. It was certainly prejudicial to appellant, as it may have exercised a controlling influence over the jury. That the admission of this evidence against appellant, under the circumstances, constitutes reversible error, is settled by the decision of this court in Ohio, etc., R. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733, and authorities there cited. See, also, La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; Ohio, etc., R. Co. v. Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20; Treager v. Jackson Coal, etc., Co., 142 Ind. 164, 166, 40 N. E. 907; Gillett's Collateral evidence, §§ 34, 333; 1 Am. & Eng. Ency. of Law (2d Ed.) 695. In Ohio, etc., Ry. Co. v. Stein, *supra*, the court said: "The rule is well settled that, where evidence of an influential character is erroneously allowed to go to the jury, it will be presumed to have prejudiced the objecting party, and unless this presumption is rebutted the judgment must be reversed."

Crescent Tp. v. Pittsburg & L. E. R. Co

As a reversal must follow for the error of the trial court in admitting in evidence the declaration in question, we do not consider the other questions discussed by counsel for appellant, as it is evident, we think, they will not arise again on another trial.

Judgment reversed, and cause remanded, with instructions to grant appellant a new trial.

CRESCENT TP. v. PITTSBURG & L. E. R. CO.

(Supreme Court of Pennsylvania, Jan. 7, 1907.)

[65 Atl. Rep. 942.]

Eminent Domain—Injunction—Preliminary Injunction—Location of Railroad.—A preliminary injunction on a bill by a township to enjoin a railroad company from appropriating a portion longitudinally of the township road to straighten and widen the railroad will not be granted.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Crescent Township against the Pittsburg & Lake Erie Railroad Company. From a decree refusing a preliminary injunction, plaintiff appeals. Affirmed.

The bill was in substance as follows:

(1) The township of Crescent is a township of the first class, under the act of April 28, 1899, in Allegheny county, Pa. (2) The Pittsburg & Lake Erie Railroad Company is a railroad corporation, incorporated under the act of April 8, 1868, having its principal office in Pittsburg, Pa. (3) In 1897, at No. 6, December sessions, 1896, of the quarter sessions court of Allegheny county, a public highway was laid out in Crescent township from the Beaver county line through the village of Shousetown to the Flaugherty Run road on and along the old abandoned roadbed of the Pittsburg & Lake Erie Railroad Company. For more than 1,700 feet, in said village, said public highway is known as "High street." (4) Said public highway was laid out and duly opened to the width of 40 feet. Since 1897 it has been continually used and traveled as such and the part thereof known as "High street" is not an ordinary country road, but is abutted on the southerly side by many building lots whereon are many residences. (5) The northerly side of the part of this public highway known as "High street" is adjoined, abutted, and paralleled for the entire distance of upwards of 1,700 feet by the right of way of the Pittsburg & Lake Erie Railroad Company, whereon said company's railroad has been located, constructed, and operated for a period of more than 14 years. (6) Plaintiff charges that defendant company has unlawfully entered upon the location and roadway of the part of said public highway, known as "High street," has begun to dig up, excavate and render it impassable,

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with the avowed intention of appropriating and subjecting said part thereof known as "High street," to its own use and possession, to build and construct thereon longitudinally its tracks and roadbed in pursuance of the expressed and declared purpose of straightening, widening and otherwise improving its railroad under the act of March 17, 1869 (P. L. 12). (7) Plaintiff is advised, believes, and charges that defendant company has no authority under this act or any other law or laws of the commonwealth of Pennsylvania to seize, take and occupy said public highway or any part thereof to straighten, widen, deepen, or otherwise improve its railway lines, or for any other purpose. No answer was filed, and the case was disposed of by the court upon bill and testimony.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Henry A. Jones and Franklin P. Iams, for appellant.

Samuel McClay and Reed, Smith, Shaw & Beal, for appellee.

PER CURIAM. This is not a case for preliminary injunction. We express no opinion on the merits until the facts are more fully established:

Appeal dismissed.

STATE ex rel. HARRIS et al. v. OLYMPIA LIGHT & POWER Co. et al.

(Supreme Court of Washington, June 29, 1907.)

[90 Pac. Rep. 656.]

Eminent Domain—Flooding Land—Temporary Purpose.—Where, in a proceeding to condemn certain land which petitioner sought to flood to increase a water power, no intention was disclosed to abandon the water power or to substitute some other form of power, but petitioner's manager testified that he had made inquiries as to the cost of substituting similar power for water, and found that the change was impracticable, and there was no evidence that the water power could not be increased indefinitely by means similar to those proposed, so that sufficient water could be acquired to meet all increased demands, the fact that there was evidence that the proposed improvement would furnish sufficient water power only for the next six years did not warrant the denial of the application because the appropriation sought was for a temporary purpose.

Same—Exercise of Power—Authority of Corporation.*—Where a street railroad company was authorized to exercise the right of emi-

*For the authorities in this series on the question what is, and is not, a public use for which property may be condemned, see footnotes appended to *Cozad v. Kanawha Hardwood Co.* (N. Car.), 21 R. R. 791, 44 Am. & Eng. R. Cas., N. S., 791; *Great Falls Power Co. v. Great Falls, etc., R. Co.* (Va.), 21 R. R. 776, 44 Am. & Eng. R. Cas., N. S., 776; *Collier v. Union Ry. Co.* (Tenn.), 17 R. R. 426, 40 Am. & Eng. R. Cas., N. S., 426.

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nent domain to increase a water power to operate its street railway and lighting system, it was not deprived of such right by the fact that its articles authorized it to furnish power to individuals, which was not a public use for which it could exercise the right of eminent domain, and that it was within its power to successfully evade detection in case power was furnished to individuals after condemnation of relator's land.

Same—Damages.—Where a street railroad company desired to condemn certain land to increase a water power by the construction of a canal from a river to a lake which drained into the river, the water to be held in the lake to increase the flow of the river during the day season, and the bottom of the canal to be two feet above low water in the river, the intention being that water should flow into the canal only during freshets and high water, such facts were insufficient to show injury to the owner of land on the river between the proposed intake and the outlet of the lake, in that the water in the river would not be permitted to flow across the land as it was accustomed to flow by nature.

Application to review an order in condemnation proceedings by the state, on relation of Henry Harris and others, against the Olympia Light & Power Company and others. Order affirmed.

James M. Ashton and Vance & Mitchell, for relators.

T. N. Allen and Troy & Falknor, for respondents.

MOUNT, J. This is the second review of this case. When it was here before, we held that the respondent Olympia Light & Power Company was not authorized to exercise the power of eminent domain to secure electric power for sale to the public. The cause was therefore remanded to the lower court, with leave to amend the petition so as to ask only for the condemnation of land sufficient for the purpose of furnishing electric power to operate respondent's street railway and lighting system. *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672. The petition in condemnation was accordingly amended, and, upon a hearing, the trial court found and entered an order adjudging the use sought to be a public use, and that certain of relators' lands are necessary to be taken for such use. This review is prosecuted from that order.

The respondent Olympia Light & Power Company is a domestic corporation, operating an electric street railway between the city of Olympia and the town of Tumwater and through the streets thereof, and also an electric light system in said city and town. Its electric generating plant is located at the mouth of the Des Chutes river in the town of Tumwater. This plant is operated by means of water taken from said river. During the months of July, August, and September of each year there is not sufficient water in the river to effectually operate the railway and electric lights, but during the rest of the year there is an ample supply of water for that purpose, and during the months from

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November to May of each year, when freshets and high water frequently occur, much water runs to waste. In order to conserve this waste water, respondent corporation proposes to divert the river into Lake Lawrence, a fresh-water lake some 26 miles up the river from Tumwater, and proposes to raise the surface of this lake some 30 feet above its natural surface. It is proposed to divert the water from the river by a canal, the bottom of which is to be two feet above low water in the river, and by means of this canal to carry a portion of the water from the river during high water and freshets into the lake, and there hold the said water until the dry season, when the water in the lake will be gradually let out so as to supply a continuous flow in the river sufficient to generate about 500 additional horse power at the power plant at Tumwater. In order to do this, it becomes necessary to overflow a portion of relators' real estate by the rise of the water in Lake Lawrence. At the trial it was conclusively shown that the water in the Des Chutes river was not sufficient during the dry season in July, August, and September to furnish power to effectively operate the railway and light plant of respondent corporation, and that frequently on that account the railway service was suspended for short intervals in those months. This, of course, showed the necessity for more power during such times. In the case of *State ex rel. Harlan v. Centralia, etc., Co.*, 42 Wash. 632, 85 Pac. 344, this court held that a street railway company might condemn lands not adjacent to its right of way for the purpose of developing a water power to create power for its system. It is conclusively shown that the rise of the water in the lake will cover the land sought, and, since it is conceded, or, at least, was decided in this case when it was here before, that the street railway and electric lighting systems are for a public use, it follows that the respondent was authorized to condemn the land sought.

The relators contend, however, that the appropriation here sought is for a temporary purpose. This contention is based upon evidence to the effect that the additional power which will be created by the proposed improvement will be sufficient to supply the demand for the next six years only, and thereafter additional power will be required, provided the growth of Olympia and Tumwater continues in the future as is calculated by the manager of the respondent corporation. This contention seems to us to be without merit. There is no evidence in the record that the power sought is for a temporary purpose. No intention is disclosed to abandon the water power or to substitute some other form of power. On the other hand, the respondent's manager testified that he had made inquiries as to the costs of substituting steam power for water, but that the cost of such change is prohibitory. Furthermore, there was no evidence to show that the water power now used could not be increased indefinitely by means similar to those now proposed, and sufficient water power thus acquired to meet all increased demands. Conceding, how-

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ever, that the proposed improvement will not be sufficient to meet the demands after six years' time, that fact of itself is not sufficient to show a temporary use, because other power may then be used to supplement rather than displace the power in use. It is therefore unnecessary to discuss or pass upon the question whether lands may be condemned for a temporary use.

Relators also contend that the right of eminent domain should not be permitted in this case, because respondent's articles authorize the furnishing of power to individuals, which is not a public use, and because it is within the reach of respondent corporation to successfully evade detection in case such power shall be furnished to individuals after condemnation of relators' land for a public use. This question was before us in the case of *State ex rel. Harlan v. Centralia etc., Co.*, *supra*, where we said: " * * * When a corporation, whose articles disclose purposes some of which are public and some of which are not, seeks to exercise the right of eminent domain, we may look to its application and the evidence introduced at the hearing to determine what its real purposes are. Measured by these tests, there can be no question as to the purposes of the respondent corporation, for both its application and the testimony show that it desires this power that it may further its business as a common carrier. But, while the exercise of this right of eminent domain must be guarded jealously, so that the private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property taken for a public use from being subsequently diverted to a private use must rest rather in the supervisory control of the state than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business may be as easily diverted by it to a private use as it may by one having both public and private objects. It is not the object for which a corporation is formed that prevents it from wrongdoing. The preventive rests in the power of the state to compel it to lawfully exercise its granted privileges." This language is especially applicable to this case and determinative of it upon this point, because both the petition to condemn and the testimony in support thereof show that the lands sought to be condemned are necessary for a public use, and that respondent corporation intends to so use it. Furthermore, the evidence fairly shows that the amount of electricity furnished for power purposes for private use may be readily determined at any time, so that the public and private uses may be readily separated.

Relators next contend that respondent corporation, if permitted to condemn in this action, will damage relators' land in a manner not mentioned in the petition. The evidence shows that the Des Chutes river flows through relators' land at a place not desired to be taken, and such land lies between the proposed intake and outlet of Lake Lawrence, and that the water taken from the river by respondent corporation will not be permitted to flow

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across relators' land as it is accustomed to flow by nature. Relators argue from these facts that damages will accrue on account thereof. If this question is proper to be considered at this time, there is certainly nothing in the evidence to justify a refusal to permit the power of eminent domain for that reason. It is true the evidence shows that the river is suitable for floating logs and shingle bolts, but it is not shown that relators have ever used, or intend to use, the river for that purpose. Respondent does not propose to interfere with or divert water from the stream at low water. The bottom of the intake is to be two feet above low water in the river, so that the flow of water in the river will be lessened only when the water is at least two feet above low water and during freshets and high water. It is difficult, therefore, to imagine how the rights of the relators to the ordinary flow of water in the river will be injuriously affected. If the injury arising from the diversion of a portion of the stream is remote and inconsequential, relators would not even be entitled to damages. There is nothing in the record now to even show any damages.

The other questions presented have been fully determined against relators' contention, and need not be further considered.

The order of the trial court is therefore affirmed.

HADLEY, C. J., and ROOT, FULLERTON, CROW, DUNBAR, and RUDKIN, JJ., concur.

CARETTA RY. CO. v. VIRGINIA-POCAHONTAS COAL CO. et al.

(Supreme Court of Appeals of West Virginia, April 26, 1907.)

[57 S. E. Rep. 401.]

Eminent Domain—Nature of Power—Public Use—Railroads.*—A company organized under and pursuant to the laws governing the organization of railroad companies in this state has the power to exercise the right of eminent domain, and the taking of property necessary for its corporate purposes is for a public use.

Same—Determination of Right.*—The fact that a charter for a railroad has been granted to a corporation does not, conclusively and beyond consideration, establish the right of the corporation to take land for its use. Whether the particular corporation has such right may be passed on under all the facts and circumstances by the courts.

Same—Proceedings—Evidence as to Right to Take.*—A railroad company, chartered and organized under the laws of this state, is au-

*For the authorities in this series on the question as to who may exercise the power of eminent domain, see note, 3 Am. & Eng. R. Cas., N. S., 36 (foreign corporations); *Detroit & T. S. L. Co. v. Campbell* (Mich.), 19 R. R. R. 482, 42 Am. & Eng. R. Cas., N. S., 482 (effect of existence of receivership on right of corporation to condemn land; and right of de facto corporation to exercise power);

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thorized to condemn land under the power of eminent domain, and where it has filed a proper application for such purpose, and shows that it has complied with the law controlling the organization of such companies, it has the prima facie right to exercise such power, and it then devolves upon the owner to rebut the prima facie case by showing that the land sought to be condemned is not for public use.

Same—Nature of Right—Public Use—Determination.†—Private property may be taken for public use upon paying or securing to be paid just compensation, and, while the question as to whether or not a particular use is a public use is one for judicial determination, yet, if a particular use is declared by the Legislature to be a public one, the courts will hold such use public, unless it plainly appears not to be so.

Same.†—Whether a use is public or private is to be determined by the character of such use, and not by the number of persons who enjoy it, or avail themselves of it.

Same—Railroads.†—The fact that the route of a proposed railroad is through a mountainous and sparsely settled country, or that the number of persons who will use the road for the purpose of transporting freight, or for passenger service, is limited, is immaterial, provided all have a right so to use it.

Brannon, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County.

Action by the Caretta Railway Company against the Virginia-Pocahontas Coal Company and others. From a judgment in

State v. Superior Court of King County (Wash.), 7 R. R. R. 929, 30 Am. & Eng. R. Cas., N. S., 929 (right of lessor railroad to condemn land); Southern Kansas Ry. Co. v. Oklahoma City (Okla.), 6 R. R. R. 244, 29 Am. & Eng. R. Cas., N. S., 244 (right of Southern Kansas R. Co. to condemn land in Indian Territory for turnouts and sidings); Postal Tel. Cable Co. v. Oregon Short Line R. Co. (Mont.), 3 R. R. R. 432, 26 Am. & Eng. R. Cas., N. S., 432 (right of telegraph company as a de facto corporation to exercise power of eminent domain); Morrison v. Thistle Coal Co. (Iowa), 7 R. R. R. 462, 30 Am. & Eng. R. Cas., N. S., 462 (right to condemn land under Code of Iowa, § 2028); Pittsburgh, etc., Ry. Co. v. Sanitary Dist. of Chicago (Ill.), 18 R. R. R. 813, 41 Am. & Eng. R. Cas., N. S., 813 (scope of judicial inquiry as to power to exercise right of eminent domain); Wellsburg, etc., R. R. Co. v. Panhandle Traction Co. (W. Va.), 15 R. R. R. 631, 38 Am. & Eng. R. Cas., N. S., 631 (section 11 of chapter 52, Code of West Virginia, does not confer upon courts equity jurisdiction to condemn property of a railroad, turnpike or canal company for a crossing for another railroad, turnpike, or canal company); Collier v. Union Ry. Co. (Tenn.), 17 R. R. R. 426, 40 Am. & Eng. R. Cas., N. S., 426, (power of terminal railroads to condemn property); Central of Georgia Ry. Co. v. Union Springs, etc., Ry. Co. (Ala.), 18 R. R. R. 820, 41 Am. & Eng. R. Cas., N. S., 820 (that certificate of incorporation of railroad does not contain the names of incorporators who signed declaration of intention to form corporation can not be urged to defeat condemnation proceedings, although Alabama Code 1896, § 1163, empowers a railroad to condemn land "when duly organized"); New York, New Haven, etc., R. Co. v. Welsh (N. Y.), 3 Am. & Eng. R. Cas., N. S., 229 (foreign corporation, under New York statutes); notes, 3 Am. & Eng. R. Cas., N. S., 24, et seq.

†For the authorities in this series on the question what is, and is

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favor of defendants, plaintiff brings error. Reversed and remanded.

W. B. Kegley, Rucker, Anderson, Strother & Hughes, and Stokes & Sale, for plaintiff in error.

S. M. B. Coulling and Chapman & Gillespie, for defendants in error.

SANDERS, P. Application was made to the circuit court of McDowell county by the Caretta Railway Company to condemn lands for the purpose of constructing a railroad, of which proper notice was given to the parties interested in the property sought to be condemned. One of the defendants, W. F. Harman, appeared and filed an answer, claiming to be the owner of the land sought to be condemned, contesting the corporate existence of the plaintiff, denying that the plaintiff, by its charter, is authorized to construct and operate the line of railroad for which it is seeking to condemn the land, and denying that the land proposed to be taken is for public use. Upon the hearing the circuit court held the applicant not to be such a corporation as under the laws of this state has the power to exercise the right of eminent domain, that the proposed use of the land sought to be condemned was not a public use, and that the applicant had no right to condemn the same, and dismissed the application, and it is this judgment that we are now called upon to review.

There can be no question that a railroad company, duly organized and chartered under the laws of this state, is such a corporation as can exercise the power of eminent domain. Our statute expressly so provides; and it is difficult, indeed, to determine upon what theory the circuit court could find that the applicant was not such a corporation as had the right to condemn the property in question. It was duly chartered under the laws of this state as a railroad corporation, was organized as such, and had taken all the necessary steps for the purpose of acquiring the land sought to be taken; and, when these things appear to have been done, the only material question involved is whether or not the use to which the land proposed to be taken is to be put is a public one. The rights of the public in railroads organized and chartered under the laws of this state are fixed and well defined by our statute. The duties and obligations of the railroads are likewise well prescribed and defined. They are constituted public highways, for the purpose of carrying freight and passengers, which purpose they must fulfill, and as to the doing of which they have no discretion, and the compensation which they are to receive for such transportation is fixed by law, and thus the public

not, a public use for which private property may be condemned, see foot-notes appended to *Cozad v. Kanawha Hardwood Co.* (N. Car.), 21 R. R. R. 791, 44 Am. & Eng. R. Cas., N. S., 791; *Great Falls Power Co. v. Great, etc., R. Co.* (Va.), 21 R. R. R. 776, 44 Am. & Eng. R. Cas., N. S., 776; *Collier v. Union Ry. Co.* (Tenn.), 17 R. R. R. 426, 40 Am. & Eng. R. Cas., N. S., 426; *Offield v. New York, etc., R. Co.* (U. S.), 22 R. R. R. 152, 45 Am. & Eng. R. Cas., N. S., 152.

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has an established interest in such railways. They are organized and operated under and pursuant to the laws of this state, and are controlled and regulated by law. It is true that they are owned by private stockholders. All corporations are thus formed; but while this is true, and they are managed and controlled by private individuals, yet this does not rob them of their public character, nor deprive the public of the rights given them therein by statute. This court has repeatedly held that it is a question for judicial determination as to whether or not the use for which land is to be appropriated is a public use, and that, while the Legislature may authorize the condemnation of property, yet the courts must at last determine whether or not the exercise of that power for that particular purpose, authorized by the Legislature, is a public use. The Legislature cannot, by declaration, no matter how clearly expressed, make that a public use which is essentially private. "Both reason and authority lead us to the conclusion that the existence or nonexistence of a public use in any given class of cases, in which the Legislature has authorized private property to be condemned, must be determined by the courts." *Varner v. Martin*, 21 W. Va. 534; *Railway Co. v. Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Balt. etc., R. Co. v. Pittsburgh, etc., R. Co.*, 17 W. Va. 812; *Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410. A company organized under and pursuant to the laws governing the organization of railroad companies in this state has the power to exercise the right of eminent domain, and the taking of property necessary for its corporate purposes is for a public use. We have attempted to show that it is the established rule under statutes giving and securing to the public such interests and rights as are given to them under our statute by which railroad companies are organized and controlled that the use is a public one. Then it remains to be determined as to whether or not the railroad corporation, in invoking the power of eminent domain, is in the lawful exercise of its corporate privileges and franchises. It is true a charter to a railroad company is not conclusive upon the question of the right to condemn land; but, where a railroad company has acquired its charter, organized as provided by law, and located its railroad, it is prima facie entitled to condemn. As was said in the case of *Varner v. Martin*, *supra*: "Though if a particular use of it be declared by the Legislature to be a public use, the courts will hold such use to be public unless it manifestly appears that it is not a public use." *U. S. v. Gettysburgh Electric Ry. Co.*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; *Woodward v. Central Vt. Ry. Co.*, 62 N. E. 1051, 180 Mass. 599. Therefore, when it appears that the applicant has complied with the provisions of the statute, it devolves upon the landowner to show that the use for which the land is sought to be taken is not a public use.

It appears that the Caretta Railway Company is a railroad corporation, chartered and organized under the laws of this state, and that the purpose for which it seeks to condemn the land in

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question is that of constructing a branch line to the Iaeger & Southern Railway, and ultimately to connect the branch then constructed with the Clear Fork Branch of the Norfolk & Western Railway, or what is better known as the West Virginia & Southern Railway. The branch line, for the purpose of constructing which the land is here sought to be condemned, begins at the mouth of Barranshe creek, and extends for a distance of two miles up that creek. It is insisted that the railroad runs up Barranshe creek to a lumber camp on the lands of the Virginia-Pocahontas Coal Company, which company owns a body of about 15,000 acres of land, which is valuable only for its coal and timber; that, if this road is constructed, it furnishes transportation for the coal and timber of the Virginia-Pocahontas Coal Company to the Iaeger & Southern Railway, and by this road furnishes an outlet to market; that it is further shown that the stock of the Virginia-Pocahontas Coal Company is held to a very large extent by one George L. Carter, and that at least a majority, if not all, of the board of directors, is composed of said Carter and of clerks of said Carter in his office; that it also appears that there are 250 shares of stock of the Caretta Railway Company, and that the same George L. Carter owns 246 of said shares, the other shares being held by Mr. Powell, his attorney, and three clerks in the office of Mr. Carter and Mr. Powell; and that it also appears that the majority of the board of directors are the same in both companies, and that this little railroad, only a part of which it is now proposed to construct, runs through a rough, rugged, mountainous section, very sparsely settled, and with no prospect of any development of any character except the mining and shipping of coal and shipment of timber from the lands of the Virginia-Pocahontas Coal Company. Giving to these contentions the full weight to which they are entitled, when we add the fact that the public has the right to use this road for its purposes, everything said against the right of the applicant to condemn this property is not sufficient to defeat that right. We must recognize that in the organization of all railroad companies and in the construction of railroad lines there is a selfish interest. No company would organize and construct a railroad unless upon consideration it were believed to be the best financial interest of such company to do so. It is not the interest or the welfare of the public that is considered, or looked to, in the organization of such companies, but the promoters have in view a profitable field in which to invest their capital. *Railroad Co. v. Traction Co.*, 56 W. Va. 18, 48 S. E. 746. The property of the Virginia-Pocahontas Coal Company may be developed, and the construction of the road may mean more to it than to any individual or to any other company, yet this cannot be assigned as a reason why the use to which the property is to be put is not a public use. In the case of *Railroad Co. v. Traction Co.*, *supra*, which is a case very similar to this, questions of this character were presented and urged as a reason why the property should not be

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condemned, and Judge Poffenbarger, in discussing these questions, said: "The answer denies the right claimed by the bill on the ground that the plaintiff is not, and will not be, when completed, a common carrier, but a mere private coal road. To sustain this position, the defendant relies upon the shortness of plaintiff's line; its failure to make connection with any railroad except the Pittsburg, Wheeling & Kentucky, at the Ohio river; the fact that the Wellsburg Coal Company, a corporation, having for its stockholders the same persons who own the stock of the plaintiff railroad company owns 1,000 acres of coal land through which the railroad will be constructed and operated; and the admission of the vice president and chief engineer of the plaintiff that the principal object in constructing the road is to provide means for transporting the coal from the Wellsburg Coal Company's land. It further appears from the testimony of this witness, however, that the stockholders of the plaintiff intend to obtain a charter under the laws of Pennsylvania and extend the road from the state line to Tylerdale, near Washington, Pa., where connection will be made at the east end of the line with the Baltimore & Ohio and other railroads; that the entire length of the road, so extended, will be 28 miles; that the road has been graded and rails laid for a distance of three miles, commencing at the west end, and rights of way acquired for some distance beyond the grading towards the state line; that the road will be equipped with cars and coaches for the general transportation of freight and passengers; and that the road will be, in all respects, a common carrier. This evidence is uncontradicted, and nothing tends toward its overthrow except the circumstance of ownership by the stockholders by means of corporate organization of the coal land, and its being the principal inducement to the investment in the railroad company. But they do not exclude the intent to operate the railroad as a common carrier. The several purposes of the incorporators may consistently stand together. Other motives than the mere operation of a common carrier, and other works of internal improvement, always move the people who build them, else none would ever be constructed. They constitute fields of profitable investment, direct and indirect, and have a double character which the law recognizes and upholds. For some purposes they are private and for others public, and the private right which the stockholders and creditors have in respect to them constitute the sole inducement to their construction and operation. For the purposes of this case, it suffices to say the evidence relied upon in support of this defense is insufficient to sustain it."

An able discussion of the question as to what is a public use is given by Judge Green, in the case of *Varner v. Martin*, *supra*. The case of *Railroad Co. v. Benwood Iron Works*, *supra*, is relied upon by the defendants in error to defeat the right to condemn. The facts in that case are so widely different from those arising in the case under consideration as to make it of no application here. There the Wellsburg, Wheeling & Kentucky Railroad

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Company, which had constructed its line, and had it then in operation, filed its petition for the purpose of condemning a right of way upon which to construct a branch of its road to the property of the Wheeling Steel Works Company. Part of the land sought to be taken belonged to the Benwood Iron Works, and it contested the right to condemn. Under the circumstances the court said: "Stripped of all the disguises thrown around the case of the petitioner, it clearly appears that its object is to condemn the land of the defendants for the purpose of enabling it to lay a siding, switch, branch road, or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose, as stated in the original petition, 'of transporting freights to and from said steelworks over the petitioners' said railroad.'" Here we have a duly chartered corporation seeking to condemn property, not for a branch, but for its main line. The fact that its route is through a mountainous and sparsely settled country, or that the number using the road for the purpose of transporting freight, or as a passenger, is limited, is immaterial, provided all have a right so to use it. The fact that all the people of the state do not need it does not change its character as a common carrier, as in the very nature of things no railroad serves all the people, and, when it serves those living along its route, or who desire to travel over it, the shortest line is as much impressed with the character of a public highway as is the longest one. "It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is immaterial." *Butte, etc., Ry. Co. v. Montana, etc., Ry. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Lumbering Co. v. Johnson*, 30 Or. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818. The length of the line of the proposed road can have no bearing upon the questions involved, as under our statute it could be extended by simple resolution, and it is a matter of history, shown by our reports, that the Deepwater Railway Company, when chartered, extended only from Deepwater to Glen Jean, a distance of a very few miles, but the directors of that road, by availing themselves of the provisions of the statute, have extended their line until it bids fair to become one of our great trunk systems.

The judgment of the circuit court is reversed, and we render judgment in favor of the plaintiff in error upon the issue tendered by the answer of the defendant W. F. Harman, and hold that it has the lawful right to condemn the land in question for the purpose of the construction of its railroad. And this case is remanded to the circuit court of McDowell county, for the purpose of assessing, in the manner provided by law, the compensation to be paid for the land, and for further proceedings to be had therein according to law.

SCRUTCHFIELD v. CHOCTAW, O. & W. R. Co.

(Supreme Court of Oklahoma, Feb. 14, 1907.)

[88 Pac. Rep. 1048.]

Eminent Domain—Railroads—Location on Highway—Rights of Abutting Owner.—The location and operation of a railroad upon a public highway may occasion incidental inconvenience and injury to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burthen on his soil, his injury is the same in kind as that suffered by the community in general, and he cannot recover in an action therefor.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by C. H. Scrutchfield against the Choctaw, Oklahoma & Western Railroad Company. Judgment for defendant. Plaintiff brings error. Affirmed.

This action was commenced in the district court of Logan county by the filing of the following petition: "Comes now said plaintiff and for his cause of action against said defendant alleges and avers: That defendant is a corporation duly created, organized, and existing under and by virtue of the laws of the territory of Oklahoma, and that such defendant has constructed a railroad within the corporate limits of the city of Guthrie, in said territory. That plaintiff was, long prior to the construction of such railroad as aforesaid, and ever since has been, and still is, the legal owner in fee simple of lots ten (10), eleven (11), thirteen (13), and fourteen (14) in block sixty-five (65), and lot fifteen (15) in block fifty (50), all in that part of said city known as 'East Guthrie.' That at all said times plaintiff had and still has a good dwelling and residence house on said lots ten and eleven and a brick business building on said lot fifteen, and used said lots thirteen and fourteen for a wood market and other purposes. That said residence lots ten and eleven are located on Vilas avenue, in said city, and were at all said times. That such avenue was a lawful avenue and street of said city, and was laid out and worked by said city, and was a thoroughfare on which the public had a right to travel, and the same was much used by the general public for such purpose, that said avenue ran east and west in the front of said residence lots, and that Vine street runs north and south twenty-five feet west of said lots. That defendant has constructed its railroad upon and appropriated one-half of said Vine street, and has constructed its said road upon, over, and across said Vilas avenue at a point about 75 feet west from plaintiff's said residence lots, and has completely and permanently obstructed and closed said avenue to any use or travel by the

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public, and has permanently closed and prevented said avenue from being used as an outlet from said lots. Plaintiff further alleges that said lots thirteen and fourteen are and were located on Springer avenue at the corner of Vine street, aforesaid, and before the construction of said railroad were valuable as a residence site, and also for the business purpose for which the plaintiff was using them as aforesaid. That defendant has constructed its railroad upon and along said Vine street at a point about 40 feet west of said lots, and has appropriated and closed to the public one-half of said street; that said street was a lawful public and much used thoroughfare, the same as said Vilas avenue. Plaintiff further alleges that said lot fifteen is located on Harrison avenue, a short distance west of said railroad; that for a long period of time said avenue, a short distance east of said lot and at the place where said road is now built, was completely cut off and closed to the use of the public; that during all said time plaintiff was engaged in business on said lot, buying and selling new and second-hand goods, and wood, dealing in live stock and other business; that a large part of his business patronage came from points east of the point at which defendant obstructed said avenue, and that, as a consequence of such obstruction, plaintiff's business and profits therefrom were greatly injured and lessened; that said avenue was a lawful and public thoroughfare the same as said Vilas avenue; that it ran east and west past plaintiff's said business lot, and was a good business street with prospects of becoming much better. Wherefore, by reason of all the foregoing actions and doings of said defendant, plaintiff's said real estate has been rendered much less valuable, and plaintiff has been otherwise injured and damaged, all the plaintiff's damage in the sum of four thousand dollars, for which sum with the costs of this action he prays judgment against said defendant." To this petition the defendant filed a general demurrer upon the grounds that the petition does not state facts sufficient to constitute a cause of action. The cause coming on to be heard in the court below, upon the demurrer, the same was by the court sustained and the cause dismissed, at the cost of the plaintiff, and from this ruling and judgment of the trial court the cause is brought to this court upon error.

H. M. Adams and Devereux & Hildreth, for plaintiff in error.

M. A. Low, C. O. Blake, and Dale & Bierer, for defendant in error.

GILLETTE, J. From the foregoing statement of facts, it is manifest that the question presented in this case is whether or not the owner of real property can maintain an action for damages thereto, by reason of the lawful construction of a railroad where no part of the premises are taken by the railroad right of way, and where the only damage complained of is such as arises by reason of the construction of the railroad across a street which runs in front of the plaintiff's property, and which street is ob-

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structed by the construction of the railroad, at the point where said street is so crossed. From the petition filed in this case, and which is set out in the statement of facts herein, it is apparent that the defendant constructed its line of road so as to occupy the west half of Vine street, which runs north and south in the city of Guthrie. This street is crossed at right angles by Harrison avenue upon which the plaintiff owns a business lot, about 150 feet west of the railroad. It is also crossed at right angles by Vilas avenue, upon which the plaintiff owns a dwelling house property, about 75 feet east of the railroad, and is also crossed at right angles by Springer avenue, upon which the plaintiff owns two lots, about 40 feet east of the railroad. The east half of Vine street is open to public travel, which permits ingress and egress to plaintiff's property east of the line of road. All the streets of the city are open to the plaintiff's property, except the west half of Vine street, which is occupied by the defendant company. Immediate ingress and egress is not obstructed. It is not claimed that Harrison avenue was permanently closed at the intersection of Vine street; on the contrary, the admitted facts in the brief show that after the construction of the road a bridge was built over the road the full width of the street. Nor does the petition show that Springer avenue was completely obstructed. It does show, however, that Vilas avenue was at the intersection of said railroad completely obstructed to public travel. From this it will appear that no part of the plaintiff's property has been taken, and that the damages sought to be recovered is a consequential injury which affects all persons in the vicinity alike, except, possibly, in the degree of injury believed to have been sustained because of the construction of a line of railway along a public street of the city.

Every person has the same interest and right in a public street or thoroughfare that any other person has, except that property owners have a special right of ingress and egress to their property from the street, which right may not be taken from them without just compensation, because this is an injury peculiar to the particular property owners so affected. It is not pretended in this case that ingress or egress to the property in question is affected by the construction of the line of railroad at the place where it was constructed, and it was not injured, therefore, in a manner different from what all the real property in that vicinity was injured. The plaintiff in error seems to admit this proposition as stated in the following language, which we quote from his brief: "We think the rule to be got from all the authorities is this: Where the intrusion on the highway by the railroad results only in personal inconveniences—that is, an injury suffered by the public in general—no recovery can be had; but, where by reason of such invasion of the highway the value of plaintiff's property is depreciated, because either the easements of light and air or of access is curtailed, then there is a taking of property for which an action will lie, because this easement is property,

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and any injury to it is a taking for which compensation must be made." The plaintiff, arguing his case from the basis of the statement above made, seems to take the position that the right of access to property is curtailed if there is an obstruction to a street upon which his property abuts, although at a point distant from the property. Such argument ignores the proposition that a right of recovery in an action of this kind must, if maintainable, be based upon an injury peculiar to the individual as distinguished from the public generally. In this respect the plaintiff's position is clearly stated in the following additional quotation from his brief: "The obstruction of the easement of access need not always be upon the immediate front of the lot, the owner of which is affected, but, if the obstruction, though remote, renders access to such property more difficult, or impairs it in a substantial manner at a point where it abuts upon the street, the property rights of the owner are invaded and he may recover"—citing in support of the proposition *Dantzer v. Railroad Co.*, 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. Rep. 343.

As the above is a clear statement of the only issue in this case, we have examined with care the authority cited in support of it, and are constrained to say that we do not think this view and statement of the law is upheld by the decision cited, the syllabus of which is as follows: "(1) A constitutional right to a remedy for an injury to property does not include the right to recover for an injury not different in kind, but only in degree, from that suffered by the community in general from the vacation of a remote part of the street, though it causes depreciation in the value of property, but leaves ample means of access thereto. (2) depreciation in the value of property by the added inconvenience of access thereto consequent on the vacation of a part of the street at a point some distance therefrom is an injury not different in kind, but only in degree, from that suffered by the community in general." In the body of the opinion that court defines what is meant by the term "community in general." "The community in general does not mean those who use the street and yet reside at such a distance from the railroad as to suffer none of the annoyances incident to its construction and operation, but it means those who reside in the immediate vicinity of the railroad, and are subject to the inconveniences incident to such a structure. The location and operation of a railroad upon a public highway may occasion incidental inconvenience to an abutting landowner, but, until it cuts off or materially interrupts his means of access to his property, or imposes some additional burthen on his soil, his injury is the same in kind as the community in general." Mr. Justice Howard of that court, specially concurring in the opinion, says: "There can be no doubt, however, that the overwhelming weight of authority, at least in this state, is in favor of confining the award for such damages to those who are deprived, in whole or in part, of access to that section of the highway immediately abutting upon or in front of

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their own real estate." Applying the rule here laid down to the case at bar, it becomes manifest that the plaintiff's injury, if any, must inevitably be the same as that of other lot owners in that immediate vicinity, and under the authority of this case the plaintiff would not be entitled to recover. The same rule is stated in *Stanwood v. City*, 31 N. E. 702, 157 Mass. 17, 16 L. R. A. 591, where the court says (in syllabus): "A city which has discontinued a part of a street is not liable in damages therefor to an owner of land which is diminished in value by the diversion of travel caused by closing the street, where the access from the land to the system of private streets remains substantially unimpaired." In *Hammond et al. v. Commissioners*, 28 N. E. 902, 154 Mass. 509, the court in its reasoning upon the rule of damages says: "It often happens that some persons are so situated as to derive a very great benefit from a public improvement, while they enjoy and use it no differently from all of the public who use it at all; but they are not for that reason specially taxed for the cost of it. So, too, they may suffer greatly from the discontinuance of it by the public authorities, but, if their suffering does not differ in kind from that of the public generally, they are not entitled to compensation in damages." And in *Davis et al. v. Commissioners*, 26 N. E. 848, 153 Mass. 218, 11 L. R. A. 750, the controlling principle of damages in such cases is stated in the syllabus as follows: "The fact that the approach to certain lands by a public street in one direction will be cut off by a change ordered by the county commissioners does not entitle owners of such land to maintain a petition for certiorari to quash the proceedings of the commissioners, as their injury is not different in kind from that of other landowners in the vicinity." In the case of *East St. Louis v. O'Flynn*, 10 N. E. 395, 119 Ill. 200, 59 Am. Rep. 795, the Supreme Court of Illinois announces the rule as follows: "The legal vacation by a city of streets and alleys is not a 'taking' or 'damaging' without compensation." And in the body of the opinion the court says: "The rule of law on this subject was stated by this court in *City of Chicago v. Union Building Association*, 102 Ill. 379, 40 Am. Rep. 598, where it was said, for any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree." In *Brady v. Shinkle*, 40 Iowa, 576, the rule stated in the syllabus is to the same effect, viz.: "An action for damages for the vacation of a highway cannot be maintained by a citizen unless he is injured in some other manner than the public generally." The Supreme Court of Colorado in the case of *Whitsett v. Union Depot*, 15 Pac. 339, 10 Colo. 243, hold to the same theory of damages, and in the opinion says: "If the plaintiff suffered no special injury peculiar to himself, and distinct from the general inconvenience experienced by the public, by the acts complained of, he has no standing in equity for injunctive relief. The rule laid down in the *City of Chicago v. Building Association*, 102 Ill.

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393, 40 Am. Rep. 598, and in support of which many authorities are cited, is that for an act obstructing a public and common right, no private action will lie for damage of the same kind as those sustained by the general public, although in a much greater degree."

Authorities might be multiplied almost without limit that where, as in this case, no part of the plaintiff's premises have been taken, the street upon which his property abuts not interfered with, and his only grievance consists in not having free and unobstructed access to his premises on one particular street in one direction. All the other streets of the city being open and unobstructed, he suffers no other or different kind of grievance or damage than such as is common to the general public, and he cannot recover. It is undoubtedly true that the application of this rule works a hardship in some cases and perhaps in this, and it is also true that some cases may be found holding a contrary doctrine, but we are satisfied that the overwhelming weight of authority is in keeping with the view herein expressed. The right of property in this case claimed (an easement in a street) is one burdened with governmental interference and control for the public good. Inconveniences and possibly damages may result therefrom, but they must be borne by each citizen, since they result as conditions incident to the enjoyment of the benefits resulting from government.

Finding no error in the record, the judgment of the court below must be affirmed. All the Justices concurring, except BURFORD, C. J., who presided in the court below, not sitting.

WALKER v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Kansas, June 8, 1907.)

[90 Pac. Rep. 772.]

Railroads—Fires—Duties of Farmers.*—Farmers through whose lands a railroad is operated may cultivate and use such lands in accordance with the methods customary among farmers, and are not required to take unusual precautions against loss from fire negligently set out by a railroad company.

Same.*—While an adjacent owner would not be warranted in needlessly placing combustible property close to a railroad in a place of known danger contrary to common usage, a farmer who permits dry grass or cornstalks to remain in a field where they were grown, as farmers usually do, is not deemed to be negligent, and should not be deprived of redress for loss of property burned through the negligence of the railroad company.

(Syllabus by the Court.)

Error from District Court, Marion County; O. L. Moore, Judge.

Action by C. C. Walker against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

King & Wheeler, for plaintiff in error.

M. A. Low and Paul E. Walker, for defendant in error.

JOHNSON, C. J. C. C. Walker brought an action against the Chicago, Rock Island & Pacific Railway Company, alleging that sparks were thrown from a locomotive of a passing freight train, starting a fire on his farm, which ran through his young orchard, destroying some of the trees and damaging others. By the testimony it appears that the railroad of the defendant passes diagonally through plaintiff's farm. On one side of the track plaintiff had planted several hundred young apple trees in the spring of 1903, and in that year had raised a crop of corn in the same field. The corn had been cultivated in the growing season, but afterwards crab grass and some weeds had grown in the field. The corn was gathered, leaving the stalks where they had grown, and the crab grass, which had dried up in the fall, was left upon the ground. On March 9, 1904, the fire occurred which burned the trees, and the testimony tends to show that the sparks and

*For the authorities in this series on the subject of contributory negligence in allowing combustibles to be near a railroad right of way, see foot-notes appended to *St. Louis, etc., R. Co. v. League* (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772; *Cincinnati, etc., Ry. Co. v. Cecil* (Ky.), 22 R. R. R. 607, 45 Am. & Eng. R. Cas., N. S., 607; *Brown v. Oregon R. & N. Co.* (Wash.), 20 R. R. R. 595, 43 Am. & Eng. R. Cas., N. S., 595; *Southern Ry. Co. v. Patterson* (Va.), 19 R. R. R. 828, 42 Am. & Eng. R. Cas., N. S., 828

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cinders from defendant's engine started the fire in the dry grass in the plaintiff's field, and not on the right of way of the railway company.

The verdict was in favor of the defendant, and the plaintiff complains of the following instruction given by the court on the subject of the contributory negligence: "The defendant in this case claims that if the fire did originate from the defendant's train that the plaintiff himself was guilty of contributory negligence, and that, by reason of such contributory negligence, he cannot recover in this cause. And the contributory negligence of which the defendant alleges and claims the plaintiff to be guilty is that he permitted combustible grass and stalks to grow and accumulate and become dry in very close proximity to the right of way of the defendant company, and that he did not exercise ordinary and reasonable care in protecting his own property from the fires that are liable to originate from the ordinary operation of a railroad train over the plaintiff's farm. Upon that question you are instructed that persons who own property adjoining or near a railroad are bound to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it; and, if the plaintiff in this case allowed dry grass and weeds and dry cornstalks to remain on his premises adjoining the defendant's right of way, so that the fire could readily start therein, then I instruct you that this is a circumstance for you to consider as tending to prove contributory negligence on the part of the plaintiff. But the question of contributory negligence, of course, is entirely for the jury to determine from all the evidence in the case. If you find that the plaintiff was guilty of contributory negligence but for which the fire would not have caught, then he cannot recover in any event." This instruction is drawn and given upon the theory that it is the duty of the owner of land adjoining a railroad to keep it free from all combustible material, so that sparks and cinders thrown out by a locomotive will not readily start a fire on his land, and that the failure to do this is such contributory negligence as will bar a recovery for loss resulting from such a fire. The rule of responsibility is not correctly stated, and the instruction was not applicable to the facts of the case. The building of a railroad through the plaintiff's land does not deprive him of any beneficial use to which it is adapted. He could still farm it in the usual and ordinary way, and was not required to abandon any proper use, nor to take special precautions against fire negligently set out by the railroad. Nothing in the testimony indicates that the plaintiff's farming operations were unusual. He cultivated his corn, and gathered it from the stalks as is the custom of the country. After the cultivation of the corn the usual crop of wild grass sprung up, which, in the course of time, ripened and dried, and this was left where it had grown. It was no more his duty to remove the stalks and dry grass from the field than it would have been to have removed the dry grass from an adjacent pasture, meadow,

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or prairie land in its natural state. The stubble of harvested wheat is easily ignited by fire thrown from a locomotive, but it would hardly be contended that an owner of a wheat field should abandon wheat growing or be required to remove the stubble from the field because of the risk from fire negligently set out.

In *Railway Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612, a fire case, it was held that an adjacent owner was entitled to use his land in the ordinary way, and was not chargeable with contributory negligence for the mere failure to take precautions against the negligence of the railway company, and in deciding the case the rule of liability stated by Chief Justice Agnew, of Pennsylvania, was quoted. "The conclusion from the case is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but, in order to be held for contributory negligence, must have done some act, or omitted some duty, which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of a railroad company, indeed, are not bound to expect that the company will be guilty of negligence." See, also, *Railroad Co. v. Schultz*, 93 Pa. St. 341; *Patton v. S. L. & S. F. Ry. Co.*, 87 Mo. 117, 56 Am. Rep. 446; *Kendrick v. Towle*, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526; *Railroad Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447; *Railroad Co. v. Grossman*, 17 Ind. App. 652, 46 N. E. 546; *Railway Co. v. Stephens*, 173 Ill. 430, 51 N. E. 69; *Railroad Co. v. Kern*, 9 Ind. App. 505, 36 N. E. 381; *Railway Co. v. Jones*, 86 Ind. 496, 44 Am. Rep. 334; *American Strawboard Co. v. C. & A. R. Co.*, 177 Ill. 513, 53 N. E. 97; *Kellogg v. Railway Co.*, 26 Wis. 233, 7 Am. Rep. 69; 2 Thompson on Negligence, § 2314.

If the plaintiff used his land for legitimate purposes, and in the manner usually followed by other farmers, he cannot be deprived of redress for injuries resulting from the negligence and wrong of another. Of course, this does not mean that a person can invite and increase peril, or needlessly and recklessly put his property in a position of known danger and be free from fault. That is not the usual or reasonable method of farming; and therefore, if it were shown that the owner needlessly stacked or stored combustible material unnecessarily close to a railroad, and perhaps if it appeared that he placed or permitted accumulations perilously close to the track, and contrary to the practical and customary method of farming in the country, it would be such evidence of contributory negligence as should be submitted to a jury. A landowner, of course, takes all the risks of losses resulting from fire where the railroad is operated with due care, but all know that, even with the exercise of proper care, fire sometimes does escape from locomotives, and hence it is not practical or sensible for any one to needlessly deposit combustible material unnecessarily close to a railroad track. For that reason,

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probably, it is not a common practice of farmers owning lands adjacent to a railroad to pile up or permit accumulations of material easily ignited unnecessarily close to a railroad, and thus enhance the risk and bring on the destruction of their own property. As has been seen, an owner cannot needlessly thrust his property in the way of danger, nor safely depart from the customary methods employed by others. This view has already been recognized; as well as the rule that after a fire has been started an owner should use reasonable diligence and effort to protect his property from destruction. *Railroad Co. v. Chase*, 11 Kan. 47; *Railway Co. v. Brady*, 17 Kan. 380; *Railroad Co. v. Hotham*, 22 Kan. 41; *Railway Co. v. Owen*, 25 Kan. 419; *Railway Co. v. Kincaid*, 29 Kan. 654; *Railroad Co. v. Ayers*, 56 Kan. 176, 42 Pac. 722; *Railroad Co. v. League*, 71 Kan. 79, 80 Pac. 46. Here, however, there was no piling up of dry grass, weeds, or cornstalks, no accumulations of combustible rubbish unnecessarily close to the track, nor was there any attempt to show that the plaintiff's method of farming and caring for his fields were not in line with the common usage among the farmers of the country. In the absence of such testimony, there was no occasion or excuse for submitting the question of plaintiff's negligence to the jury. It is equally clear that the instruction to the effect that the mere leaving of stalks and dry grass on the land where they grew should be treated as proof of contributory negligence was not a correct rule.

For the error in charging the jury, the judgment will be reversed and the cause remanded for a new trial. All the Justices concurring.

BLACK v. MICHIGAN CENT. R. CO.

(Supreme Court of Michigan, Dec. 3, 1906.)

[109 N. W. Rep. 1052.]

Railroads—Injuries to Persons near Tracks.—A stream, which was stocked with fish by the state, ran through a lumber yard; all persons who desired to do so being admitted to the yard, that they might fish in the stream. A child, seven years of age, was fishing there, when defendant's train entered the yard on a siding and struck an empty car with such force as to push it over the end of the siding, when it struck and killed the child. Ties and rails had been thrown up at the end of the siding to prevent any car from passing off the rails. Held, that defendant was guilty of actionable negligence.

Death—Damages—Death of Child.—In an action for the death of plaintiff's minor son, there being evidence as to the age, calling, and condition of health of plaintiff, the age and condition of the mother, and it being shown that the boy was healthy, intelligent, and of an

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excellent disposition, the evidence was sufficient to authorize the jury in awarding substantial damages.

Same—Excessive Damages.—In an action for the wrongful death of plaintiff's son, aged seven years and one month, it appearing that the child was healthy and intelligent, and of excellent disposition, a verdict for \$1,500 was not excessive.

Error to Circuit Court, Otsego County; Nelson Sharpe, Judge.

Action by Walter R. Black, as administrator of the estate of Charles Black, deceased, against the Michigan Central Railroad Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Argued before CARPENTER, C. J. and MCALVAY, GRANT, BLAIR, and MOORE, JJ.

Cooley & Hewitt, for appellant.

De Vere Hall, for appellee.

MOORE, J. Plaintiff's son, aged seven years and one month, was killed by one of the cars of defendant. The father brought this action to recover damages under the provisions of section 10,427, Comp. Laws. He recovered a judgment in the sum of \$1,500. A motion for a new trial was made, which motion was overruled. The case is brought here by writ of error.

In giving his reasons for overruling the motion, the judge stated the questions involved so clearly that we quote therefrom:

"The grounds on which the motion is founded may be considered under three heads: (1) Errors in charge as to the contributory negligence of the deceased boy. (2) Error in charge as to measure of damages. (3) Excessive verdict. These will be disposed of in the order presented.

"(1) The facts as proven show that a switch or siding left defendant's main line near the depot at Wolverine in Cheboygan county and ran to the northwest through the lumber yard operated by the Cornwall estate; that at the north end the ends of the rails were slightly elevated, and some ties placed thereon; that such end was from 16 to 20 feet from the bank of the river passing through Wolverine; that posts supporting a tramway were between the end of said rails and said river; that the deceased and two little girls were fishing along the river, and, when defendant's train entered said siding to do some switching, an empty car standing thereon was struck with such force as to push it over the end of the switch, when it struck and killed said boy. Was there such danger involved in standing or passing behind the end of the spur or switch as should have been apparent to a boy of seven years of age? I am unable to so conclude as a matter of law. Neither can I assent to defendant's claim that a child of that age must be held chargeable with the same knowledge of danger while in such a position as a man of mature years. The presence of a railroad track may be said to indicate the presence of danger, and when on such a track the danger may be said to be as apparent to a boy of seven years of age as

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to an adult. But it would, in my judgment, be extending the doctrine of due care to a much greater extent than either law or fairness should dictate, to hold that this boy, while apparently out of danger, was chargeable that a car might be forced over the end of the rails and the ties placed thereon by the negligence of defendant's servants. I am of the opinion that the question of contributory negligence of the deceased was fairly presented to the jury.

"(2) It is insisted that no facts were placed before the jury on which they could find that the plaintiff, as administrator, has sustained any damages. No witnesses were called to testify as to what the services of such a lad over and above the cost of his maintenance would be worth. While such evidence is admissible under the rule in *Rajnowski v. Railroad Co.*, 74 Mich. 27, 41 N. W. 847, is it necessary to put it in to entitle plaintiff to recover? The speculative nature of such evidence is admitted by defendant's counsel. Necessarily the opinions of such witnesses would be in the nature of a guess. So many considerations are involved as might well cause any prudent man to hesitate before expressing an opinion. The cases of *Cooper v. Railroad Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; *Hurst v. Railroad Co.*, 84 Mich. 539, 48 N. W. 44, and *Charlebois v. Railroad Co.*, 91 Mich. 59, 51 N. W. 812, are relied on by defendant's counsel as containing an intimation, if not an express holding, that some such proof must be offered. I have examined these cases with much care, and believe that they throw but little light upon the question. That such evidence is admissible seems well established. But, except in cases where it may be shown that the boy's services are likely to be more valuable than those of the ordinary lad, the jury could be but little if in any way assisted thereby. The question is one of judgment, and, if this statute is to be given any reasonable construction, in my opinion, the jury should be left to determine plaintiff's damages after having been furnished proof of the avocation of the parents and their probability of living during the minority of the child. The value of such services is speculative, and the judgment of the individual jurors, when merged into a verdict, is quite as likely to approximate what is right and just as though aided by speculation of witnesses. The plaintiff's failure to offer such proof is not, in my opinion, ground for a new trial.

"(3) Was the verdict excessive? I am unable to so conclude under the repeated decisions of our Supreme Court. In the *Cooper Case* a judgment for \$1,550 was affirmed. The deceased was a girl 11 years of age. While the courts will not disturb a lesser verdict as inadequate, one of \$1,500 should not be held to be so excessive as to require its reduction or as a reason for granting a new trial."

Counsel for defendant insists a verdict should have been directed in its favor for two reasons: (1) Defendant was not guilty of actionable negligence; (2) no damages were recover-

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able because there was a failure of proof as to pecuniary injury. We will discuss these contentions in the order presented.

1. The claim of counsel is stated in their brief as follows: "It is believed that this case does not differ in any degree from one where the injured person is a trespasser in the yards, or on the premises of the railroad company. Plaintiff's son had no lawful business and no right to be at the end of this track. The duties owing by the defendant toward this boy, who was at most but a bare licensee on the premises of the Cornwall Company, were only to refrain from willful and malicious injury to him"—citing *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481, and other cases. The record discloses that the stream where these children were fishing was stocked with trout by the state; that during the fishing season all persons who desired to do so were permitted to come into the millyard, along the margin of the stream where the children were, and fish. It also shows that it was about 25 feet from the end of the spur to the margin of the stream; that, at the end of the spur, ties and rails had been thrown up to prevent any car from passing off the end of the rails. The car which hurt the child was pushed, by a train put upon the siding, beyond this obstruction at the end of the rails. It is claimed this train was backed upon the spur much more rapidly than it ought to have been and without being under the control of the trainmen. Instead of the child being where it had no right to be, it was the car that was where it had no right to be, and where no one had any reason to suppose that it would come. We do not think the contention of counsel for defendant can be sustained.

2. We again quote from brief of counsel: "The declaration in the case at bar alleged that the plaintiff had suffered pecuniary injury, but the record is absolutely barren of evidence to support the allegation. There was no proof, even to the extent of a bare statement of a witness, that pecuniary injury had been sustained. Mr. Black, the boy's father, testified that his son had been killed, and gave the ages of himself, his wife, and son. The trial court held that this was ample to justify the jury in assessing substantial damages, despite the protest of defendant's counsel, who argued that its effect was to leave the jury in the field of speculation, and to make each of the jurymen witnesses for plaintiff as to whether pecuniary injury had been suffered and the amount thereof. Proof could and should have been supplied, not only of the condition in life of the father and mother, their education, and occupation, but also of the cost of educating, clothing, and maintaining such a boy until he becomes self-supporting; and also the probable amount of his net earnings above expense of maintenance from that time until he becomes of age. All this proof can be based on experience in similar cases. That some evidence of this character must be supplied to justify a recovery is settled law in this state,"—citing *Hurst v. Detroit Railway Co.*, 84 Mich. 539, 48 N. W. 44, and other cases. An examination

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of the cases cited will show they are authority for the proposition that, in an action for damages because of the death of a minor, it is competent to give testimony of the kind mentioned by counsel. The precise question, however, now presented, has not been passed upon by this court. Some phases of the case were discussed in the cases cited by counsel and in the more recent case of *Snyder v. Railroad Company*, 131 Mich. 418, 91 N. W. 643, in which it was said: "There was no testimony from which the earning capacity of this boy could be computed to a mathematical certainty. It was a question about which different persons might and would disagree. Such testimony as the parties were able to produce was offered on each side. The weight of that testimony, its credibility, and the conclusions to be drawn from it, were for the jury."

Upon the trial, in addition to what it stated in the quotation from counsel's brief, the age, calling, and condition of health of the father was given, and the age and condition of the mother. It was also shown that the boy was healthy, intelligent, of an excellent disposition, and obedient to his parents. The question presented here has been before other courts. In *Parsons v. Railway Company*, 94 Mo. 286, 6 S. W. 464, it is said: "The law presumed the life of a minor child to be of value to his parent, because he is entitled to his services and is responsible for his support during minority. He is necessarily injured by a wrongful act resulting in the death of such minor child, which thereby deprives him of the value of those services and casts upon him the burden of legal liability for that support when deprived of the value of such services, enhanced by the additional expense of providing medicine, medical attention, and nursing during illness, and for funeral charges when he dies. To compensate him for this loss and this burden, the law allows the parent of such minor substantial damages, and they may be measured by the experience and judgment of the jury, enlightened only by a knowledge of the age, sex, and condition in life of the deceased, and the parent is not restricted to the recovery of merely nominal damages, because the value of the services of the child, or the amount of expenses incurred or paid for his support, and other necessities during illness, or funeral expenses, be not proven. An intelligent jury, from common experience, may determine approximately, in any given case, what amount would compensate a parent for all pecuniary losses sustained by reason of the death of a minor child."

The case of *City of Chicago v. Hesing*, Adm'r, 83 Ill. 204, 25 Am. Rep. 378, is instructive upon two of the questions raised in the court below. The action was brought to recover damages for the death of a boy four years old. The court said: "Only pecuniary damages can be recovered in such actions as this. Nothing can be given as solace or for bereavement suffered. Under instructions declaring the true rule for estimating the damages, the jury found for plaintiff, in the sum of \$800, but one of

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the errors assigned is the amount found is excessive. As a matter of law, we cannot so declare, and, as a matter of fact, how can we know the amount is in excess of the pecuniary damages sustained? When proof is made of the age and relationship of the deceased to next of kin, the jury may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experience in relation to matters of common observation. It is not indispensable that there should be proof of actual services of pecuniary value rendered to next of kin, nor that any witness should express an opinion as to the value of services that may have been or might be rendered. Where the deceased was a minor, and left a father who would have been entitled to his services had he lived, the law implies a pecuniary loss, for which compensation, under the statute, may be given." See, also, *Birkett v. Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Railroad Co. v. Sciacca*, 80 Tex. 350, 16 S. W. 31; *Railway Co. v. Barker*, 39 Ark. 491.

The jurors have all been boys. The average juror knows the conditions which surround a boy in a family like that of plaintiff. We think it cannot be said as a matter of law that there was no basis upon which to find a verdict for pecuniary loss. Upon the question of excessive damages, see, also, *Cooper v. Railway Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; *McDonald v. Steel Co.*, 140 Mich. 401, 103 N. W. 829.

Judgment is affirmed.

BAHR v. NORTHERN PAC. RY. CO.

(Supreme Court of Minnesota, June 14, 1907.)

[112 N. W. Rep. 267.]

Damages—Personal Injuries—Mental Anguish.*—In an action for personal injuries, the mental anguish or suffering which can be proved is such only as is endured by the plaintiff as the direct consequence of injury to himself.

Same—Evidence.†—A sufficiently definite objection to evidence concerning the number and ages of his children should be sustained.

Appeal—Harmless Error.—In view of the amount of the verdict in this case, which is held not to have been excessive, and of other cir-

*See foot-note appended to *McDermott v. Severe* (U. S.), 21 R. R. R. 628, 44 Am. & Eng. R. Cas., N. S., 628; foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; *Long v. Chicago, etc., Ry. Co.* (Okla.), 20 R. R. R. 589, 43 Am. & Eng. R. Cas., N. S., 589.

†For the authorities in this series on the subject of the admissibility and effect of evidence of the financial circumstances, or size of the family, etc., of parties, in negligence cases, see foot-notes appended to *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

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circumstances, the error in permitting plaintiff to state the number and ages of his children in answer to preliminary questions is held to be without prejudice.

(Syllabus by the Court.)

Appeal from District Court, Anoka County; Arthur E. Giddings, Judge.

Action by J. W. Bahr against the Northern Pacific Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Emerson Hadley, for appellant.

F. E. Latham and *A. F. Pratt*, for respondent.

JAGGARD, J. Plaintiff and respondent, employed as a brakeman for defendant and appellant railway company, brought suit to recover injuries caused by a fall when he was attempting to jump from the engine on which he was riding as it was about to collide with a train on the track on which it was running. It is conceded that there was sufficient evidence of negligence, and that it was a question for the jury to determine whether or not plaintiff was justified in jumping from the engine. The jury returned a verdict for \$1,775. The appeal was taken from the order denying a new trial.

The preliminary question is whether or not the damages awarded by the jury were excessive and were given under the influence of prejudice or passion. Plaintiff's testimony tended to show these facts: By his fall he was hurt in his back and hips. Suffering pain, he was immediately sent to a railway company hospital. His back was so lame and sore that he could hardly move. He had no appetite and could eat nothing. The hospital surgeon told him that his back was sprained. He left that hospital, and some two weeks afterwards went to another, where he has been ever since. Since then he has suffered pain in his kidneys, at the base of the spine, and across the small of his back. He had not been able, at the time of the trial, March 23, 1906, to do any work since he was hurt, December 2, 1905, although he was improving. He had been able to earn \$80 per month. He was largely corroborated by his physician. There was expert testimony tending to show a tenderness in his back and around his spine. His attending physician testified that he will fully recover in time, but that he could not tell "how it would be." While plaintiff's expert testimony was substantially impeached in a number of respects, and especially as to injury to glands, and while there were no clear objective evidences of internal injury, the trial judge refused to grant a new trial. The verdict was large under the circumstances, but we think we would not be justified in reversing the ruling of the trial court in this regard.

The second question in the case concerns the propriety of the reception by the court of certain evidence. When the case was

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called for trial the plaintiff was put on the stand, and was immediately asked the following questions and gave the following answers: "Q. You are the plaintiff in this action? A. Yes, sir. Q. What do you call your home? A. Duluth, Minn. Q. You are a married man? A. Yes, sir. Q. Wife and two children? (Objected to as irrelevant and immaterial. Court: Overruled. Exception.) A. Yes, sir. Q. Your wife and two children are now living where? (Objected to as irrelevant and immaterial. Court: Overruled.) A. At my wife's parents. Q. Where is that? A. In the southern part of this state. Q. How old are you? A. Thirty-one years." It is plain that these were preliminary questions. Such matters of inducement conventionally precede testimony as to the actual occurrences. It is elementary that in an action for personal injuries the mental anguish or suffering which can be proved is such only as is endured by the plaintiff as the direct consequence of injury to himself, and that the number and ages of plaintiff's children have no legitimate bearing upon any issue usual in such a case. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Kreuziger v. Chicago & Northwestern Ry. Co.*, 73 Wis. 158, 40 N. W. 657; *Baltimore & Ohio Ry. Co. v. Camp*, 81 Fed. 807, 26 C. C. A. 626; *City of Chicago v. O'Brennan*, 65 Ill. 160; *Pittsburg, Ft. Wayne & C. Ry. Co. v. Powers*, 74 Ill. 341; *Dayharsh v. Hannibal & St. Jo. Ry.*, 103 Mo. 577, 15 S. W. 555, 23 Am. St. Rep. 900; *Mahaney v. St. Louis Ry. Co.*, 18 S. W. 895, 108 Mo. 191; *Louisville, etc., Ry. Co. v. Binion*, 18 South. 75, 107 Ala. 645; *Purcell v. Duncan Co.*, 95 N. Y. Supp. 278, 107 App. D. 501; *Union Pac. Ry. v. Hammerlund*, 79 Pac. 152, 70 Kan. 888; *Louisville, etc., Ry. Co. v. Collingsworth*, 33 South. 513, 45 Fla. 403; *Sesler v. Rolf Coal & Coke Co.*, 41 S. E. 216, 51 W. Va. 318; *Sykes v. St. Louis Ry.*, 88 Mo. App. 193; *Railroad Co. v. Few*, 15 Ill. App. 125; *St. Louis, etc., Ry. v. Adams*, 85 S. W. 768, 86 S. W. 287, 74 Ark. 326, 109 Am. St. Rep. 85; *Kansas City, etc., Ry. v. Eagan*, 67 Pac. 887, 64 Kan. 421.

While it is true that in this case the ages of the children were not given, the trial judge, if a sufficiently specific objection had been raised, should have excluded the testimony. This court, in conformity with the universal trend of opinion, has refused to set aside a verdict because of the reception of improper evidence despite indefinite, general, or misleading objections. *Graves v. Bonness*, 107 N. W. 163, 97 Minn. 278. It may well be doubted whether in this case the exception was sufficiently definite. It did not point out to the court whether the basis of the objection was to the remoteness of the matter of inducement, or to its impropriety as affecting the assessment of damages. We think, however, that the essential question here presented is, not whether the ruling was theoretical error, but whether it was prejudicial error. In *Keyes v. M. & St. L. Ry. Co.*, 36 Minn. 290-294, 30 N. W. 888, plaintiff was allowed to testify that he had suffered the greatest anxiety, not for himself, but for his wife and

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daughter. The court held that this was error, but, per Judge Mitchell, said: "While we fully appreciate the danger of assuming that the admission of incompetent evidence is not prejudicial, yet in this case it is hardly conceivable that the mere statement that the plaintiff felt this anxiety for his wife and daughter could have had any appreciable influence on the jury. Under the evidence the plaintiff was almost entitled to a verdict as a matter of law. Exemplary damages were expressly excluded by the court, and the amount of the verdict was clearly within the actual money damages proved by the plaintiff. We think the admission of this evidence was error without prejudice." In the case at bar, there was no express attempt to show anxiety as a part of damages recoverable, nor to connect this testimony with their assessment; nor does it appear that it was employed in any wise for their enhancement. The only prejudice would have been indirect, uncertain, and speculative. The plaintiff was fairly entitled to some verdict. The trial court charged correctly as to the measure of his compensation. The jury awarded a sum which, as has hereinbefore been set forth, it properly refused to disturb. We think the error, if any, was without prejudice.

Order affirmed.

LEWIS and ELLIOTT, JJ. The question with reference to where the children were living was neither relevant nor material for any purpose whatever, the objection was specific and sufficient, and the court erred in overruling it; but we concur in the view that it was error without prejudice.

SOUTHERN RY. CO. v. KING.

(Supreme Court of Georgia, May 17, 1907.)

[57 S. E. Rep. 687.]

Negligence—Imputed Negligence—Driver of Vehicle—Husband and Wife—Crossing Accident.*—The doctrine that the negligence of the driver of a vehicle, who by such negligence contributes to cause a collision with a locomotive, is not imputable to another person riding by invitation in the vehicle, unless that person had some right or was under some duty to influence the driver's conduct, is applicable in the case where a wife is accompanying her husband in a buggy

*For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Atchison, etc., Ry. Co. v. Calhoun* (Okla.), 22 R. R. R. 791, 45 Am. & Eng. R. Cas., N. S., 791; foot-notes appended to *Peterson v. St. Louis Transit Co.* (Mo.), 22 R. R. R. 732, 45 Am. & Eng. R. Cas., N. S., 732; foot-notes appended to *Hanson v. Manchester St. Ry.* (N. H.), 22 R. R. R. 675, 45 Am. & Eng. R. Cas., N. S., 675; foot-notes appended to *McBride v. Des Moines City Ry. Co.* (Iowa), 22 R. R. R. 318, 45 Am. & Eng. R. Cas., N. S., 318.

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driven by him, and a collision occurs between the buggy and a locomotive, whereby she sustains injuries.

Railroads—Injuries at Crossings—Evidence—Sufficiency.—The negligence of the husband, if he was negligent, under the facts in this case, not being imputable to the wife, the evidence was sufficient to sustain the finding in her favor.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by Josephine King against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Erwin & McMillan and *John J. Strickland*, for plaintiff in error.

Howard Thompson and *R. R. Arnold*, for defendant in error.

BECK, J. The plaintiff, while riding in a buggy with her husband, who was driving, was injured by a collision with a locomotive, drawing a passenger train on the defendant's road, at a public crossing. There was evidence showing that the defendant's employees had neglected to observe the blow-post law, and that the train passed over the crossing at a high and negligent rate of speed. There was some evidence tending to show that a traveler along the public highway, on account of obstructions along and near the track of the railway, could not see an approaching train until at or very near the railroad track. But it is not necessary to set out this evidence, or to argue the question as to whether or not, under the evidence, the husband was guilty of such negligence in driving upon the track as would preclude a recovery for injuries resulting to him from the collision. The collision was fatal to him; but this suit was not instituted to recover damages for the homicide of the husband, but was brought to recover damages for injuries which the plaintiff received as a result of the collision, which she alleges was a result of the negligence of the defendant and its employees, and in no way the result of any negligence on her part. According to the testimony of the plaintiff herself, the husband was the driver of the vehicle in which she was riding at the time she received the injuries, and she was in the buggy as his companion, but exercising no control whatever over him. She thus states the situation in her own words: "When the buggy was struck by the train, my husband was in charge of the buggy and driving. I had nothing to do with it. I was not driving the buggy—had nothing to do with driving the buggy. I did not tell him how to drive it, or where to drive it, or where to stop, had nothing to do with it. I was just going with him to church, and coming back with him from church. He was in charge of the mule and buggy." Under this evidence the question as to whether or not, if the husband was guilty of negligence in driving upon the

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railroad track, that negligence was imputable to her, necessarily arose.

Upon the question of imputable negligence, the court charged the jury as follows: "I charge you that, if Mrs. King [the plaintiff] was in control of that vehicle in driving it, and, having driven it across the railroad, I charge you that, if then Mr. King, her husband, was guilty of negligence, whatever negligence he was guilty of would be imputable to her—she would be charged with it. But if he was in control of the private conveyance, and driving it and controlling it, and she was going along with him as his companion, then I charge you that she would not be chargeable with his negligence." The exception to the charge is that "the doctrine as applied is not applicable to husband and wife." In the case of *Roach v. W. & A. R. Co.*, 93 Ga. 785, 21 S. E. 67, it was held that, where one was riding by invitation in a buggy with another, the negligence of the latter was not imputable to him, unless he "had some right or was under some duty to control or influence the driver's conduct." See, also, Civ. Code 1895, § 2902. In the case of *Metropolitan St. R. Co. v. Powell*, 89 Ga. 602, 16 S. E. 118, it was held that "if the plaintiff herself was free from negligence, and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant, and it not appearing that she was the owner of the horse or wagon, or that she had any agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all the damages consequent upon the injury, and can take no credit as to any part thereof on account of the contributory negligence of the driver of the wagon." And this doctrine is so well recognized that citation of cases supporting it is unnecessary. Its applicability to a case in which the husband was the driver of the vehicle and the wife was his companion at the time she received the injuries, which were due to the concurrent negligence of the husband and the railroad company, seems to be denied by the exception to the charge complained of; but the contention is met by an almost unbroken array of authorities to the contrary. It was said by the Supreme Court of Indiana: "'Where one accepts the invitation of another to ride in his carriage, thereby becoming in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful or skillful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury.' We can see no good reason why the foregoing statement does not apply to a wife riding with her husband with as much reason as to a stranger riding with him." *Louisville, etc., Railroad Co. v. Creek*, 14 L. R. A. 733, 130 Ind. 139, 29 N. E.

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481. See, also, annotations to this case in footnotes. In the case of *Platz v. City of Cohoes*, 24 Hun, 101, the Supreme Court of New York says: "The court charged the jury that the plaintiff was not responsible for carelessness on the part of her husband in driving, unless she did some act encouraging the carelessness, and declined to charge the contrary proposition. In these rulings we are of the opinion that the learned judge was right. They are sustained by abundant authority, conceding that the plaintiff was to be deemed a mere passenger." In his Commentaries on the Law of Negligence, Judge Thompson states the true doctrine to be: "Although there are a few holdings to the contrary, mostly in jurisdictions where the doctrine of imputed negligence is recognized, yet there is no ground, in reason or justice, growing out of the marital relation, for making a different rule from the one just discussed for the case where a wife has committed her safety to her husband, as where she is riding in a vehicle and he is driving, than in any other case; and the weight of authority is that, in such a case, the negligence of the husband is not imputed to the wife."

No other rulings or portions of the charge were excepted to in any grounds of the motion now insisted upon; it being admitted that the questions raised by the other exceptions to the charge were disposed of adversely to the plaintiff in error by the decision in the case of *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508. The negligence of the husband, if he was negligent, under the facts in this case, not being imputable to the wife, the evidence was sufficient to sustain the finding in her favor, and the judgment of the court below in refusing a new trial is affirmed. All the Justices concur.

ST. LOUIS, I. M. & S. RY. CO. *v.* CHAPPELL & BILLINGSLEY.

(Supreme Court of Arkansas, May 20, 1907.)

[102 S. W. Rep. 893.]

Railroads—Permitting Use of Road by Others—Liability for Negligence.*—A railroad company, which permitted a log company to make a joint use of its tracks, but not under a lease, was liable for a loss by fire caused by sparks negligently permitted to escape from an engine of the log company.

Same.—Where a railroad company allows another company to make a joint use of its tracks, but there is no lease executed, and an injury results by the operation of the road by the licensee, in an action therefor against the corporation owning the railroad the other company is not a necessary party.

Appeal from Circuit Court, Nevada County; Joel D. Conway, Judge.

Action by Chappell & Billingsley against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Tom M. Mehaffy and J. E. Williams, for appellant.

McRae & Tompkins and Oakley Cockrill, for appellee.

HILL, C. J. Appellees owned 65 tons of hay, which were stored in a warehouse near the track of appellant railroad in the town of Prescott. It was destroyed by fire, and they sued the appellant railroad company. Their allegation as to negligence was as follows: "That said fire was caused by large sparks and burning cinders, which were negligently and carelessly permitted to escape from the engine which was run or permitted to be run by the defendant on its track, and in front of and near said warehouse, where said hay was stored." The evidence satisfied the trial court that there was nothing to go to the jury as to the fire being caused by an engine of the appellant railroad; but there was sufficient

*See note, 20 Am. & Eng. R. Cas., N. S., 847; *Harbert v. Atlanta, etc., Ry. Co.* (S. Car.), 22 R. R. R. 681, 45 Am. & Eng. R. Cas., N. S., 681 (railroad can not escape liability for negligence at a crossing by turning over operation of its road to another railroad company); *Henry v. Nashville, etc., Ry.* (Ala.), 18 R. R. R. 488, 41 Am. & Eng. R. Cas., N. S., 488 (injury to property from defendant allowing another company to use its railroad to grade a branch road, insufficiency of complaint to state a cause of action); *Chicago & W. I. R. Co. v. Newell* (Ill.), 15 R. R. R. 706, 38 Am. & Eng. R. Cas., N. S., 706 (railroad company liable to passengers injured on its railway by negligence or wrong of another company operating it); *Chicago & E. I. R. Co. v. Schmitz* (Ill.), 18 R. R. R. 214, 41 Am. & Eng. R. Cas., N. S., 214 (liability for negligence of another company in using defendant's tracks); *Hamilton v. Louisiana & N. W. R. Co.* (La.), 20 R. R. R. 506, 43 Am. & Eng. R. Cas., N. S., 506 (railroad granting to lumber company privilege of running lumber train was liable when its conductor was injured in a derailment caused by defective bridge).

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evidence to go to the jury that the fire was caused by an engine run on appellant's track, which was owned by a log road, which was permitted to use the Iron Mountain track, and the case went to the jury on that theory. This engine was called the "Hardwood engine." It was shown that it had been running on the track of appellant company for nearly a year before the fire, and that it was on the track at the point where the fire occurred several times each day, and that it went on the Iron Mountain track with the permission and under the orders from train dispatchers of the Iron Mountain Company, and that at the time in question the Hardwood engine went upon the track of the Iron Mountain where the fire occurred, a short time before it occurred, under orders of the chief dispatcher at Little Rock. This engine was not equipped with a spark arrester, and at the time under inquiry was emitting large sparks. The evidence was sufficient to justify a verdict that the fire was caused by the negligent operation of this engine.

The only question presented is whether the Iron Mountain was responsible for the fire caused by the negligence of the Hardwood engine while upon the Iron Mountain Company tracks under orders and permission from it. There was no evidence of any lease of the Iron Mountain tracks to the log road. Judge Noyes, in his recent work on Intercorporate Relations, says: "Upon the principle that a corporation owing duties to the public cannot shift the responsibility for their performance without the consent of the state, a railroad company, permitting another company to use its tracks, remains liable for injuries to third persons—passengers, travelers at crossings, and others—caused by the negligence of employees of the latter company in running its trains, to the same extent as if they were its employees upon its own trains. The negligence of the licensee company is the negligence of the proprietary company." Noyes on Intercorporate Relations, 261. Mr. Elliott lays down the same principle as sustained by the weight of authorities. 2 Elliott on Railroads, § 477.

Appellee's counsel cite the court to many cases where the principles above quoted have been applied by different courts, which may be found in the briefs. The argument is made that under the Constitution and the statutes, as construed in *L. R. & Ft. S. Ry. Co. v. Daniels*, 69 Ark. 171, 56 S. W. 874, the Iron Mountain would not be responsible, and that the only liability against it would be against the corpus of the property, and in an action to enforce such liability the company causing the injury, as well as the company owning the property, would have to be jointly sued. The Daniels Case establishes the doctrine in this state that a railroad company may escape personal liability for injuries caused by negligence by leasing its property and putting the lessee company in possession and control of it, and then the lessee company is personally liable for these injuries; and in addition to that liability, the corpus of the lessor company, by virtue of the Constitution and statutes, is also liable, and in an

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action to enforce liability against the lessor company's property, both corporations must be sued, as both have an interest in the road liable to be affected by the sale of it, and both should be made parties, for the purpose of giving them an opportunity to protect the same, if they can. There is no lease shown here, and no delivery of possession and control of the Iron Mountain road, or any part of it, to the log road owing the Hardwood engine, and hence the Daniels Case does not control. Mr. Elliott states the proposition presented here as follows: "It is held by the Supreme Court of the United States that a railroad company which permits another to make a joint use of its track is liable to a person injured by the negligence of the company to which the permission is granted. [This case was *Railroad v. Barron*, 5 Wall. (U. S.) 90, 18 L. Ed. 591.] In the case to which we refer, the question of the effect of an authorized lease was not considered, and, as we believe, there was no such question in the case. The case of a joint use by two companies is essentially different from a case where the lessor company by an authorized lease parts with possession and control of the road." 2 Elliott on Railroads, 477. The author then contends that where there has been a lease under the law, and the control and possession of the railroad is turned over to the lessee company, the lessor company should be relieved of liability. This is in conformity to the doctrine of the Daniels Case; but, as therein shown, owing to the Constitution and statutes of this state, there is an added liability upon the physical property of the lessor company. In this case it was unnecessary to sue the log road jointly with the Iron Mountain.

The only other question is the sufficiency of the evidence as to the permission of the Iron Mountain Company to the log road company owning the Hardwood engine to the use of its tracks. This issue was properly sent to the jury, and the evidence is ample to sustain the finding of the jury that the tracks were used with the permission of the Iron Mountain Company.

Judgment is affirmed.

SHEPARD v. LEWISTON, B. & B. ST. RY.

(Supreme Judicial Court of Maine, Sept. 21, 1906.)

[65 Atl. Rep. 20.]

Railroads—Injury to Person on Track—Contributory Negligence—

In the case at bar, which was an action to recover damages for personal injuries, the verdict was for the defendant. Held, that the jury was authorized by the evidence to find that the plaintiff was guilty of contributory negligence, and that the verdict cannot be set aside because the jury so found.

New Trial—Bias of Juror—Evidence.—After the trial it appeared that, at the time of the trial, the foreman of the jury was in possession of a "blue book" of free tickets for carriage on the defendant's railroad. The plaintiff claimed that this fact was not known to him at the time of the trial but that it was known to the defendant's treasurer who was present during the trial.

Held, that the mere fact of the possession of the "blue book" by a juror under the circumstances as shown by the evidence and stated in the opinion is not fatal to the verdict without proof aliunde that the plaintiff was prejudiced thereby, and that there is no such evidence in this case.

Same—Misconduct of Parties.—Rev. St. c. 84, § 104, provides as follows: "If either party, in a cause in which a verdict is returned, during the same term of court, before or after the trial, gives to any of the jurors who try the cause, any treat or gratuity, or purposely introduce among the papers delivered to the jury when they retire with the cause, any papers which have any connection with it, but were not offered in evidence, the court, on motion of the adverse party, may set aside the verdict and order a new trial." Held, that this statute is mainly in affirmance of the common-law powers of the court, and is permissive only. It is expressive of the strong purpose of the lawmaking body that litigants shall have jurors free from all improper influences. But, were it mandatory, it is difficult to see how it could apply to this case. It has reference to the misconduct of parties during the term of court, and not to acts, innocent in themselves, which occurred months before the term.

(Official.)

On motion from Supreme Judicial Court, Androscoggin County.

Action by George E. Shepard against the Lewiston, Brunswick & Bath Street Railway. Verdict for defendant. Motion by plaintiff for new trial. Motion overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Verdict for defendant. The plaintiff then filed a general motion for a new trial, and also a special motion for a

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new trial, alleging in this last-named motion in support thereof as follows:

"First. C. I. Barker, the foreman of the jury which sat upon said case and rendered said verdict, while sitting upon said case and deliberating thereon possessed and had a 'blue book' so called, in which were free tickets for passages on the defendant's electric railroad, which book had been given to said foreman by said defendant corporation, which fact was without fault or collusion on the part of the plaintiff, and the information of the foreman's possession of said blue book has come to the knowledge of the plaintiff and his counsel since the close of the trial, and that neither the plaintiff nor his counsel had any suspicion or knowledge of said fact prior to, or during the progress of, the trial.

"Second. The treasurer of said defendant corporation by whom said blue book was issued was present when the jurors in said case were about to enter upon the discharge of their duties and the presiding justice stated that any stockholder in the defendant corporation would be disqualified to sit, thereby emphasizing the court's desire to have an absolutely impartial jury, and yet said treasurer did not disclose to the court that the juror Barker possessed said book."

After the filing of the special motion, testimony relating to the matters alleged in the motion was received by the court both from the plaintiff and the defendant.

Argued before WISWELL, C. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Tascus Atwood, for plaintiff.

Newell & Skelton, for defendant.

SAVAGE, J. Case for damages sustained on account of the alleged negligence of the defendant. The plaintiff, on the day in question, was engaged in moving a threshing machine loaded on wheels from a dooryard into the road. In so doing he crossed the defendant's track by the roadside. He was on foot, driving the team, and was by the side of the horses or load. On the other side of the load, at the same time, one of the defendant's electric cars was approaching. And it came into collision with the rear end of the plaintiff's load at the point of crossing, breaking down the rear wheels and causing the load to fall upon the plaintiff, so that he received the injuries complained of. The verdict was for the defendant, and the only question presented by the general motion is whether the verdict is shown to be so clearly wrong as to require the interference of the court.

The questions whether the defendant was negligent and whether the plaintiff was guilty of contributory negligence were both sharply contested. We do not, however, find it necessary to consider the first question, because we think the jury were authorized by the evidence to determine the issue of contributory negligence adversely to the plaintiff, and that is fatal to his motion. The plaintiff claims that at a point in the dooryard about

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90 feet from the railroad, the defendant's track in the direction from which the car was approaching, or at least a car upon the track, could be seen for about 1,400 feet. And he testified that, at that point, while driving out of the yard, he looked at the track in that direction, as far as he could see, and that no car was in sight. He also testified that he did not look afterwards, and that he did not hear the sound of the approaching car, and was not aware of its whereabouts until the instant of collision. His contention is that, having looked where he says he did, and no car being in sight or nearer than 1,400 feet, it was not negligence for him to proceed across the track, 90 or 100 feet, at the rate of about two miles an hour, without looking again.

It does not seem to be disputed that, from a point about 34 feet from the track and until the track was reached, an approaching car might all the time have been seen by the plaintiff for a distance of about 1,400 feet along the track, and that he could have seen this car in ample season to have stopped in safety, if he had then looked. But he did not look. The defendant claims that the point of view where the plaintiff says he looked was so obstructed by a hedge and trees, that he could not have seen the track as he says he did, or a car, if one had been there. And from this the defendant argues that the jury were warranted in finding that the plaintiff did not look at all at any place where he could see, and hence that he was clearly guilty of negligence. *Butler v. Railway*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267. Upon the question as to what the plaintiff could see, and how far, from the point where he says he looked, much evidence, pro and con, was elicited. And, besides, the jury were permitted to take a view. What they saw we have no means of knowing. From the evidence in the case we think that the jury were authorized to find, as claimed by the defendant, that the plaintiff could not see as he says he did, and so was negligent in not looking later, when he could see, in season to protect himself. Or if, as claimed by the plaintiff, he could see, they were authorized to conclude that, if he had looked, he must have seen the approaching car, and that he either did not look, or looked and saw the car approaching and yet went on the crossing without looking again, in either of which contingencies the jury might well find him negligent. The jury heard much, and conflicting, evidence as to the speed at which the car was running, and if from that evidence they concluded that the car was within 1,400 feet of the crossing when the plaintiff says he looked, and clearly within his vision, if he could see as he says he could, we find nothing in the case which requires their conclusion to be overruled. And, if the jury found that he looked and saw the car approaching, or that he could not look or did not look, their verdict for the defendant cannot be set aside under the general motion.

The plaintiff has also filed a motion for a new trial on the ground that at the time of the trial, Mr. Barker, the foreman of the jury, was in possession of a "blue book" of free tickets for

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carriage on the defendant's railroad, alleging that this fact was unknown to the plaintiff at the trial, but was known to the defendant's treasurer, who was present during the trial.

The facts appear to be these. Mr. Barker was one of the trustees of the Maine State Agricultural Society in Lewiston, to the grounds of which one of the defendant's branches is extended. The defendant's directors voted to issue "blue books" to the secretary, treasurer, and trustees of the society. On September 11, 1905, a clerk in the office of the defendant's treasurer issued the books. They were sent to the president of the society, who gave one to Mr. Barker. Mr. Barker testified that he used the book during the fair in September, 1905, and that after the fair he left it in the vest he wore at the fair, where it remained until after the trial of this case, and that at the trial he did not remember that he had the book. Up to that time he had used it nine times. After the trial at the January term, 1906, but during the term, he used the book twice. The defendant's treasurer testified, in substance, that he did not know Mr. Barker before the trial, and, as we think his testimony fairly implies, that he did not then know that Mr. Barker, the juror, and Mr. Barker, the trustee, were one and the same person. Mr. Barker was not drawn as a juror until several months after he received the book. And it is expressly disclaimed by the counsel for the plaintiff that the book was issued or received with any corrupt motive whatever.

It will thus be seen that questions of the misconduct of parties and the misconduct of jurors are not involved here. The question here is simply whether the mere fact of the possession of the "blue book" by a juror, under the circumstances stated, is fatal to the verdict, without proof aliunde that the plaintiff was prejudiced thereby, for there is no such proof. The plaintiff contends that the juror might have been biased by the possession of the book, that he might have been influenced by "a grateful and kindly feeling" towards the defendant, on account of the book, even if he had forgotten that he had it, and that where it appears that the purity of a verdict might be affected by such an influence, the presumption is against its purity, and, unless it is proven that the influence failed of its effect, that the verdict should be set aside.

It need not be said that courts are jealous of the purity of jury trials, and that they will use their full power to prevent partial and prejudiced verdicts, and to set them aside if once obtained. It is necessary that litigating parties should be able to try their rights before jurors impartial, unbiased, and unprejudiced by passion or affection. It is equally necessary, in the administration of justice, that the parties and the public should have reason to feel that the trial has been impartial, and that the verdict has not been clouded with the suspicion of prejudice. *Bradbury v. Cony*, 62 Me. 225, 16 Am. Rep. 449. The error in judgment of a merely human tribunal will be forgiven and forgotten, but not any taint of unfairness. Whenever it appears that a party

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has attempted to bias jurors by bringing improper influence to bear upon them, the court will not stop to inquire whether the attempt was successful, but will presume that a verdict in his favor was the product of vicious influence, and set it aside. So, in many cases the same result has followed when parties have without corrupt motive or wrong intent permitted influences to bear upon jurors which might bias their judgments, at least when it has not been shown affirmatively that no harm resulted. But we are not aware of any case which goes so far as we are asked to go by the plaintiff here.

The plaintiff also calls our attention to Rev. St. c. 84, § 104, which provides that, "if either party in a cause in which a verdict is returned during the same term of the court, before or after the trial, gives to any of the jurors who try the cause any treat or gratuity, * * * the court, on motion of the adverse party, may set aside the verdict and order a new trial." He contends that the continued possession and use of the book after the trial should have the effect of making the original gift a continuing one, substantially a gift during the term. This statute is mainly in affirmance of the common-law powers of the court, and is permissive only. It is expressive of the strong purpose of the law-making body that litigants shall have jurors free from all improper influences. But, were it mandatory, it is difficult to see how it could apply to this case. It has reference to the misconduct of parties during the term of court, and not to acts, innocent in themselves, which occurred months before the term.

We do not think the plaintiff has shown sufficient cause for setting the verdict aside. We cannot persuade ourselves that the gift of a "blue book" of free tickets on an electric railroad, of trivial value, as a favor, not particularly to the recipient, but rather to the society of which he was a trustee, months before the donee was, or could have been expected to be drawn as a juror, should of itself be regarded as evidence of bias or prejudice on the part of the juror, or as raising a presumption that his verdict was affected by improper influences, or that it might have been otherwise tainted.

It is true, in human experience, that almost all things are possible, but the possibility of bias under such circumstances as these seems so remote as not to be worthy of consideration. Nothing further being shown, the verdict must stand.

Both motions for a new trial overruled.

DUGGAN v. BOSTON & M. R. R.

(Supreme Court of New Hampshire, Hillsborough, May 7, 1907.)

[66 Atl. Rep. 829.]

Railroads—Crossing Accident—Death of Child—Contributory Negligence—Question for Jury.*—Where plaintiff's intestate, a child of nine, was killed by being struck by a railroad train as she was crossing the tracks at a crossing, she was not chargeable with negligence as a matter of law, though she saw the train when she started to cross in front of it.

Same—Proximate Cause.—Plaintiff's intestate, a child of nine, was killed while crossing defendant's railroad tracks. She came into the engineer's field of vision when the engine was more than 300 feet from the crossing. If the engineer had put on the brakes, the train could have been stopped in time to have avoided the accident; but nothing was done until the train was within a few feet of the crossing. Held, that defendant's negligence in failing to sooner stop the train was the proximate cause of the accident.

Exceptions from Superior Court, Hillsborough County; Pike, Judge.

Action by Joseph H. Duggan, as administrator, etc., against the Boston & Maine Railroad. A verdict was rendered in favor

*For the authorities in this series on the subject of contributory negligence in attempting to cross railroad tracks in front of a train or street car which was seen, or should have been seen, by the highway traveler before he made such attempt, see foot-notes appended to *Keller v. Erie R. Co.* (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599; foot-notes appended to *Weinberger v. North Jersey St. Ry. Co.* (N. J.), 22 R. R. R. 351, 45 Am. & Eng. R. Cas., N. S., 351; *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312; foot-notes appended to *Cranch v. Brooklyn Heights R. Co.* (N. Y.), 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610; *Kannenber v. Conestoga Traction Co.* (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80; foot-notes appended to *Hutchinson v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 683, 45 Am. & Eng. R. Cas., N. S., 683.

For the authorities in this series on the subject of the degree of care required of children for their own protection, see foot-notes appended to *Denver City Tramway Co. v. Nicholas* (Colo.), 22 R. R. R. 523, 45 Am. & Eng. R. Cas., N. S., 523; foot-notes appended to *Louisville Ry. Co. v. Esselman* (Ky.), 20 R. R. R. 627, 43 Am. & Eng. R. Cas., N. S., 627; foot-notes appended to *Birmingham, etc., Co. v. Jones* (Ala.), 20 R. R. R. 568, 43 Am. & Eng. R. Cas., N. S., 568; *Colomb v. Portland & B. St. Ry.* (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293.

For illustrations in this series showing whether children were, or were not, guilty of contributory negligence, see foot-notes appended to *Poland v. Union R. Co.* (R. I.), 12 R. R. R. 648, 35 Am. & Eng. R. Cas., N. S., 648; foot-notes appended to *Colomb v. Portland & B. St. Ry.* (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293; *Murphy v. Boston Elev. Ry. Co.* (Mass.), 17 R. R. R. 838, 40 Am. & Eng. R. Cas., N. S., 838.

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of the plaintiff, and the case was transferred on defendant's exception to the denial of a motion for a directed verdict in its favor. Exception overruled.

A highway in East Manchester, known as the "Hall Road," crosses the defendants' railroad at grade. The highway runs north and south. The railroad is built on a curve, but its general direction is east and west, and its grade is descending in both directions from the crossing. On the east side of the highway and north of the railroad is a large building known as the "wrapper factory"; its southwest corner being 41 feet north of the northerly rail. The south line of the building, if produced, would intersect the center of the railroad 436 feet east of the crossing; but at a point 11 feet nearer the track there is an unobstructed view of the railroad toward the east for more than 500 feet. For a long time a large number of small children had been accustomed to play on and near the crossing. The plaintiff's intestate either had joined or was about to join in a game of hide and seek at the crossing when she was killed. She was 9½ years old, of average size and intelligence, but very nervous when near a moving train. She left her home, which was located north of the crossing, about 7 o'clock in the evening of May 30, 1903, and went directly to the northwest corner of the factory, where she stopped a few minutes and ate some bread and butter. She was next seen at the southwest corner of the factory, where she looked down the railroad toward the east, and then, stepping a few feet nearer to the crossing, she looked down the railroad toward the west. She then started to run across the tracks, looking straight ahead, but was struck by a train from the east and killed when nearly over the crossing. At the time she was seen looking toward the east, the engine was from 500 to 600 feet from the crossing, and approaching it at a speed of from 40 to 50 miles an hour. Nothing was done to notify the child of the approach of the train, nor was any effort made to check its speed until it was within a few feet of the crossing. If the brakes had been applied when the engine was 250 feet distant from the crossing, the accident would not have happened. The engineer had an unobstructed view of the crossing, and the space between it and the factory, from the time the engine was within 400 feet of the crossing until the child was struck.

Burnham, Brown, Jones & Warren, for plaintiff.

Branch & Branch, for defendant.

YOUNG, J. As the plaintiff's intestate was but nine years old, it cannot be said as a matter of law that she was guilty of contributory negligence, even if she saw the train when she started to run over the crossing. *Warren v. Railway*, 70 N. H. 352, 47 Atl. 735; *Bisaillon v. Blood*, 64 N. H. 565, 15 Atl. 147; *Napurana v. Young* (N. J. Err. & App.), 65 Atl. 1052; *McLarty v. Railroad* (Ga.), 56 S. E. 297. It will not be necessary to consider whether she was rightfully or wrongfully on the crossing; for, if

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she was wrongfully there, that would not prevent the plaintiff from recovering, if "at the time of the accident she was in the exercise of ordinary care, and they knew of her presence in a dangerous situation, or failed to exercise due care to discover her presence in such a situation when circumstances existed which would put a person of average prudence upon inquiry" (*Brown v. Railroad*, 73 N. H. 568, 573, 64 Atl. 194); and it could be found from the fact that small children were in the habit of playing on the crossing that such circumstances existed (*Mitchell v. Railroad*, 68 N. H. 96, 34 Atl. 674). So the question whether there was any evidence from which it could be found the defendants were negligent resolves itself into the question whether or not it can be said as a matter of law that the ordinary man is accustomed to run a train at a speed of 50 miles an hour, over a grade crossing on which he knows small children may be playing, without doing anything to determine whether there are any children on it, until he is so close to it that he can do nothing to prevent an accident; for it could be found that that was what the defendants did, on the view which they concede may be taken of the evidence. According to that view, the train was moving seven times as fast as the little girl. So she came into the engineer's field of vision when the engine was more than 300 feet from the crossing, namely, seven times 45 feet, the distance from the southwest corner of the factory to the point where she was killed. If he had seen her at that time and put on the brakes, or if he had put them on when the engine was 50 or even a 100 feet nearer the crossing, it could be found that the accident would not have happened. Consequently it could be found that the defendants were negligent, and that their negligence was the cause of the accident.

Exception overruled. All concurred.

SOUTHERN RY. CO. *v.* POWER FUEL CO.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

[152 Fed. Rep. 917.]

Railroads—Fires.—Civ. Code S. C. 1902, § 2135, provides that every railroad corporation shall be responsible in damages to any person or corporation whose building or other property shall be injured by fire communicated by its locomotive engines or originating within the limits of the railroad's right of way in consequence of the act of any of its authorized agents or employees. Held, that where a fire was started by the negligence of the subboss of a railroad bridge and trestle crew, while using a boarding car as a place to sleep during the night, when he was not on duty, he was neither an agent nor employee of defendant within such section, and hence the company was not liable for the result of his acts thereunder.

Master and Servant—Acts of Servant—Liability of Master.*—Where a fire was negligently set by a railroad's subboss of a bridge and trestle crew, while he was sleeping in one of the railroad's boarding cars, when not on duty, his act was not performed in the business of the railroad company. Hence the latter was not liable for the result thereof at common law.

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

C. P. Sanders (*Sanders & De Pass*, on the briefs), for plaintiff in error.

Stanyarne Wilson (*J. A. Sawyer*, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. This was an action at law brought by the defendant in error—to be hereafter referred to as the plaintiff—against the plaintiff in error, to recover damages for the injury to the stock, equipment, and buildings of the plaintiff at Union, S. C., from fire which originated in a boarding car belonging to the defendant.

It appears that the defendant had a work train for the use of one of its bridge and trestle crews, consisting of a car used as a cooking and dining place, a sleeping car for the two white mem-

*For the authorities in this series on the question whether the master's liability for the negligence or torts of his servant depends upon whether they occurred while the servant was acting within the scope of his employment, see foot-notes appended to *Sharp v. Erie R. Co.* (N. Y.), 19 R. R. R. 683, 42 Am. & Eng. R. Cas., N. S., 683; foot-notes appended to *Roberts v. Southern Ry. Co.* (N. Car.), 22 R. R. R. 106, 45 Am. & Eng. R. Cas., N. S., 106.

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bers of the crew, a sleeping car for the negro members, and one or more cars for timber and tools. For a considerable time prior to the fire, which occurred about 11 o'clock on the night of October 22, 1904, this construction train had been placed at night after coming in from work on a short spur track close to the premises of the plaintiff. This spur track belonged to the Union & Glenn Springs Railroad Company; but it is abundantly shown that the defendant was authorized to use it for the purpose above mentioned. The foreman of the crew was a white man by the name of Pope. The only other white member of the crew was one Ayres, who died some time after the fire and prior to the trial. During the forenoon of the day preceding the fire Pope quit work and left the crew under the charge of Ayres. After the day's work was finished Ayres had his supper in the dining car, and then went into the town. He returned about 8 o'clock, and went to bed in the white sleeping car in the bed regularly used by him. In this car there was a portable kerosene lamp, provided by the defendant for the use of the occupants of the car. When this car was in motion, the lamp was usually placed in a wall bracket. On the night of the fire the lamp was on a table very near the foot of the bed used by Ayres. About 11 o'clock of that night the negro cook was awakened by cries of fire, and, on making his way into the sleeping car where Ayres was, he found the car filled with kerosene smoke and the bed and bedding ablaze. There is much evidence tending to show that Ayres, who at this juncture was standing at the window of the car, making no effort to subdue the fire, was very drunk. The alarm quickly brought numerous people to the scene, and the evidence of nearly every one who saw Ayres indicates that he was drunk. In fact, the cook appears to have found it necessary to bodily carry him from the burning car. The result of the fire was the destruction of several of the cars and of the property of the plaintiff. It appears that Pope, the foreman, and McClurkin, the cook, were employed by the month. The remaining members of the crew, including Ayres, were paid monthly at a fixed rate per day, according to the number of days of work. Ayres was in some sense a "subboss." During working hours, in the absence of Pope, he had charge of the crew. There was some evidence tending to show that at night, Pope being absent, the negro members of the crew regarded Ayres as having charge of the work train. But all of the evidence was to the effect that after work hours Ayres was a "free man." He could sleep in the car or not as he saw fit, and it was clearly shown that he returned to the car merely in order to go to bed. Since 6 o'clock that afternoon he had done no work whatever, and had none to do until the following morning at least. At the time the fire started he was in no sense engaged in performing any duty for the defendant.

The complaint is drafted under 1 Civ. Code S. C. 1902, § 2135, and also contains as a second cause of action a charge that the

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injury was the result of the negligence of the defendant. The statute referred to reads as follows:

"Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in property upon its route for which it could be so held responsible and may procure insurance thereon in its own behalf."

The assignments of error, in so far as they are now material, are based on the refusal of the trial court to direct a verdict and on the refusal to give certain instructions based on the theory that Ayres was not in the employment of the defendant at night after working hours. We regard the language of the statute, "its authorized agents" as being, so far as we are now concerned, synonymous with "employees." There was evidence tending to show that Ayres was drunk and also evidence tending to show that he in some way turned the lamp over. The one question for discussion is whether or not Ayres was at the time the fire was started an employee within the meaning of the statute.

So far as we are advised the Supreme Court of South Carolina has never ascribed to this statute any purpose other than to relieve one complaining of injury from fire originating on a railroad company's right of way of the necessity of proving negligence. *Thompson v. Railway Co.*, 24 S. C. 369. It seems to have been repeatedly held by that court that this statute is to be strictly construed. *Rogers v. Railroad Co.*, 31 S. C. 378, 9 S. E. 1059; *Hunter v. Railroad Co.*, 41 S. C. 86, 19 S. E. 197; *Lipfield v. Railroad Co.*, 41 S. C. 285, 19 S. E. 497. In 1 *Sherman & Redfield Negligence*, § 147, it is said:

"In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master."

See, also, 1 *Thompson, Negligence* (Last Ed.) § 526; 20 *Am. & Eng. Ency.* (2d Ed.) 168; *Morier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952, 47 *Am. Rep.* 793, and authorities there cited. We cannot in reason ascribe to the Legislature in enacting this statute an intent to make the railroad companies liable for the acts of their employees when not on duty and when not engaged in the performance of some business of the master's. In the case at bar Ayres was not on duty. He was not performing any

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business of his employers. He was simply making use of facilities allowed him by the defendant for his own purposes. We hold that his act was not, within the intent of the statute, the act of an employee.

From the fact that Ayres was not engaged in performing any duty as an employee, it also follows that the defendant is not liable under the common-law cause of action. We are therefore constrained to hold that the learned trial court was in error in refusing to direct a verdict for the defendant.

Reversed.

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Failure of street car passenger, injured by reason of sudden jerk, to take first seat she reached. *Weeks v. Boston Elevated Ry. Co.* (Mass.), 177.

In joint action against street railway and owner of a wagon for injury to former's passenger in a collision, as the car was operated on the street, it could be said that the driver did not exercise reasonable judgment in determining that he could pass the crossing before car could reach him; and a judgment in favor of the owner of the wagon was authorized. *Forsythe v. Los Angeles Ry. Co.* (Cal.), 447.

Of alighting passenger was question for jury. *Crowe v. Michigan Cent. R. Co.* (Mich.), 191.

One approaching crossing to take train is bound to know that it is a place of danger. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

Passenger is not required to know whether place where street car is stopped to discharge passengers is safe. *Mobile Light & R. Co. v. Walsh* (Ala.), 114.

Presumption that passenger struck by train while at station exercised due care. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

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Standing on step of crowded street car. *Chicago Con. Traction Co. v. Schritter* (Ill.), 442.

Street car passenger is not negligent in alighting at place car is stopped to discharge passengers, unless danger in doing so is obvious. *Mobile Light & R. Co. v. Walsh* (Ala.), 114.

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Punitive damages for ejection from moving train. *Atlanta & W. P. R. Co. v. Potts* (Ga.), 621.

\$1,000 was not excessive for ejection of passenger, where conduct of conductor was unnecessarily humiliating. *Southern Ry. Co. v. Cassell* (Ky.), 33.

Declaration stated cause of action against defendants jointly, though it was alleged that carrier's vehicle was under control of the servant, in action against carrier and such servant for injuries to passenger through alleged negligence of both. *Whalen v. Pennsylvania R. Co.* (N. J.), 505.

CARRIERS OF PASSENGERS—Continued.**Degree of Care.**

- Care due driver riding on freight train in charge of stock. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.
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- Care required to keep floors of street cars free from parcels and other obstructions. *Pitcher v. Old Colony St. Ry. Co. (Mass.)*, 625.
- Carrier is not insurer of passenger's safety, but is liable for negligence. *Marable v. Southern Ry. Co. (N. Car.)*, 418.
- Duty to provide things necessary for safe carriage of passenger. *Chicago, etc., Ry. Co. v. Stibbs (Okl.)*, 427.
- In action for injury to member of woman's convention, sustained while being carried free on defendant's street car, instruction that defendant was liable for want of ordinary care, and that burden of showing negligence was on plaintiff, was at least sufficiently favorable to defendant. *Indianapolis Trac. & Term. Co. v. Lawson (C. C. A.)*, 219.
- Instruction was erroneous for failure to state that degree of care required was only such as was consistent with practical operation of road. *Illinois Cent. R. Co. v. Johnson (Ill.)*, 213.
- Mail clerks. *Decker v. Chicago, etc., Ry. Co. (Minn.)*, 587.
- Skill required of carrier. *Chicago, etc., Ry. Co. v. Stibbs (Okl.)*, 427.
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- Duty of those in charge of street car to know that place where car stopped to discharge passengers is reasonably safe. *Mobile Light & R. Co. v. Walsh (Ala.)*, 114.

Ejection.

- Evidence showed that brakeman in question did expel passenger from train. *Lindsay v. Oregon Short Line R. Co. (Idaho)*, 616.
- Failure to procure ticket and refusal to pay train rate fare. *Southern Ry. Co. v. Fleming (Ga.)*, 600.
- In allegation that plaintiff was ejected from the train, and that such ejection was due to the unlawful, willful, and reckless conduct of defendant, the latter words refer to other conduct other than mere failure to transport. *Bussey v. Charleston & W. C. Ry. Co. (S. Car.)*, 460.
- Liability for wrongful ejection by brakeman. *Lindsay v. Oregon Short Line R. Co. (Idaho)*, 616.
- Reasonableness of rule requiring expulsion of passenger who refuses to pay fare or produce a proper transfer ticket. *Norton v. Consolidated Ry. Co. (Conn.)*, 437.
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Evidence.

- Custom not to have parcel racks in street cars, and custom to allow hand baggage to be put upon car floor. *Pitcher v. Old Colony St. Ry. Co. (Mass.)*, 625.

CARRIERS OF PASSENGERS—Continued.

- Evidence that there were a great number of other places in the city just as dangerous as the place in question, and at which passengers were constantly alighting in safety, was not admissible. *Mobile Light & R. Co. v. Walsh* (Ala.), 114.
- Statement of conductor that, while running over curve his car did not lurch more than any single track car would do was admissible. *Partelow v. Newton, etc., Ry. Co.* (Mass.), 605.
- Where, in action for failure to transport plaintiff, the complaint makes no reference to defendant acting as agent in selling tickets over connecting lines, but defendant relies on the fact as a defense, plaintiff may show that the ticket sold was defective over such other lines. *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 460.
- In action for injury to passenger sustained while she was alighting at a subway station, neither failure of carrier to use wider or longer cars, nor its failure to give warning of space between car step and platform was negligence, in absence of any showing that the car was not stopped at proper place, or that wider cars could have been used. *Hilborn v. Boston & N. St. R. Co.* (Mass.), 226.
- Instruction was not erroneous, on the ground that it did not require jury to find that plaintiff was a passenger. *Southern Ry. Co. v. Cullen* (Ill.), 195.

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- Duties to boarding street railway passengers. *Clark v. Durham Traction Co.* (N. Car.), 165.
- Duty of conductor of street car to notify passenger not yet seated that he is about to signal to start car. *Weeks v. Boston Elevated Ry. Co.* (Mass.), 177.
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- Injury to person accompanying passenger, sufficiency of petition. *Seaboard Air Line Ry. Co. v. Bradley* (Ga.), 183.
- Negligence in prematurely starting street car. *Clark v. Durham Traction Co.* (N. Car.), 165.
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- Negligence in running street car over curve, what must be shown to establish. *Partelow v. Newton, etc., Ry. Co.* (Mass.), 605.
- Negligence of defendant's conductor in giving signal to start was to be considered with reference to his duty to deceased, who was already in the car, and not to a passenger on car steps. *Weeks v. Boston Elevated Ry. Co.* (Mass.), 177.

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- Condition relied upon must be specially pleaded as a defense. *Pittsburg, etc., Ry. Co. v. Higgs* (Ind.), 201.
- Express messenger injured, right of railroad to plead in bar of suit for his injuries a discharge of the express company for such injuries, although they were sustained through the railroad's negligence. *Robinson v. St. Johnsbury, etc., R. Co.* (Vt.), 630.
- Express messengers. *Davis v. Chesapeake & O. Ry. Co.* (Ky.), 170.
- Express messenger's implied assent to contract between his company and railroad exempting latter from liability for injuries to the messenger; but such assent was not a waiver of his right to assert liability of railroad for negligent injuries. *Robinson v. St. Johnsbury, etc., R. Co.* (Vt.), 630.

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- Express messengers injured through railroad's negligence. *Robinson v. St. Johnsbury, etc., R. Co. (Vt.)*, 630.
- Express messengers, validity of stipulation in favor of railroad against liability for injuries to, in contact between railroad and express company. *Robinson v. St. Johnsbury, etc., R. Co. (Vt.)*, 630.
- Fact that express messenger on entering service of express company had some knowledge of an arrangement with the railroad company covering his transportation did not charge him with knowledge of anything affecting his right of recovery against the railroad for injuries through negligence. *Robinson v. St. Johnsbury, etc., R. Co. (Vt.)*, 630.
- Harmless error in admitting in evidence an "annual clergyman's reduced permit" on which plaintiff was traveling. *Marable v. Southern Ry. Co. (N. Car.)*, 418.
- Negligence. *Pittsburg, etc., Ry. Co. v. Higgs (Ind.)*, 201.
- Negligence of carrier or its servants. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.
- Provision of contract would not be enforced in an action brought in Indiana, where passenger was injured, though valid in New York, where made. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.
- Stipulation was not applicable as conductor in ejecting passenger did not act in good faith, and passenger's recovery was not limited to amount paid for ticket. *Pierson v. Illinois Cent. R. Co. (Mich.)*, 591.
- Negligence of conductor in allowing passenger to ride on running board without warning him of danger from proximity of trolley poles. *Tietz v. International Ry. Co. (N. Y.)*, 411.
- Negligence of conductor in suffering bag to be placed and to remain on floor of street car, whereby passenger was caused to stumble. *Pitcher v. Old Colony St. Ry. Co. (Mass.)*, 625.
- Negligence of driver of other vehicle was no defense where passenger was injured by reason of collision between such vehicle and his street car. *Forsythe v. Los Angeles Ry. Co. (Cal.)*, 447.
- Negligence of railroad operating the ferry was for the jury, where passenger on ferry boat was injured by collision between boat and bulkhead. *Prethrow v. West Jersey & S. R. Co. (Pa.)*, 211.
- Notice to carrier that person in charge of stock was riding in cattle car, instead of caboose, sufficiency of. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.

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- Collision. *Enos v. Rhode Island Suburban Ry. Co. (R. I.)*, 612.
- Rebuttal of prima facie case of negligence made out by evidence of collision between trains. *Pittsburg, etc., Ry. Co. v. Higgs (Ind.)*, 201.
- Railway was not a party aggrieved by refusal to render judgment against owner of the vehicle in question, in joint action against it and the railway for injury to passenger by the latter in a collision between such vehicle and a street car, there being no right of contribution between such codefendants. *Forsythe v. Los Angeles Ry. Co. (Cal.)*, 447.
- Risks assumed by person riding on freight train in charge of stock. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.
- Risks assumed in taking passage on freight train. *Marable v. Southern Ry. Co. (N. Car.)*, 418.

Rules and Regulations.

- Person in charge of stock may be required to ride in caboose. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.

Separation of White and Colored Passengers.

- White passenger mistaken by conductor for colored, petition

CARRIERS OF PASSENGERS—Continued.

- must allege that plaintiff is a white man. *Wolfe v. Georgia Ry. & Elec. Co. (Ga.)*, 180.
- Though it might have been the duty of the driver of the wagon to have stopped until defendant's car had passed, the car's motor-man did not exercise the highest care to plaintiff's decedent, a passenger, because he failed to stop the car, though knowing a collision would ensue. *Forsythe v. Los Angeles Ry. Co. (Cal.)*, 447.
- Ticket sold by railroad for journey to be made partly by railroad and partly by ferry, passenger injured on ferry was not required to show that railroad operated ferry. *Prethrow v. West Jersey & S. R. Co. (Pa.)*, 211.
- Use of standard three-step passenger car of height and construction commonly used by railroads is not negligence, although four-step cars are used on some roads. *Crowe v. Michigan Cent. R. Co. (Mich.)*, 191.

Who Are Passengers.

- Drover carried on stock train. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.
- Employee riding home after day's work on certain kind of ticket. *Enos v. Rhode Island Suburban Ry. Co. (R. I.)*, 612.
- Express messengers. *Davis v. Chesapeake & O. Ry. Co. (Ky.)*, 170.
- Free passage. *Indianapolis Trac. & Term. Co. v. Lawson (C. C. A.)*, 219.
- Mail clerks. *Decker v. Chicago, etc., Ry. Co. (Minn.)*, 587.
- Person with proper mileage book trying to board train by passing along platform of freight house where he had been to check his trunks. *Pincus v. Atlantic Coast Line R. Co. (N. Car.)*, 112.
- Person with transfer injured while attempting to board connecting street car. *Clark v. Durham Traction Co. (N. Car.)*, 165.
- Shipper's employees. *Southern Ry. Co. v. Cullen (Ill.)*, 195.

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- Application of N. Car. Revisal, 1905, § 2601. *Shepard v. Suffolk & C. R. Co. (N. Car.)*, 28.

CHILDREN.

See DEATH BY WRONGFUL ACT.

Contributory Negligence.

- Care required of children. *Illinois Cent. R. Co. v. Johnson (Ill.)*, 213.
- Nine year old child killed at crossing was not chargeable with contributory negligence as matter of law, though she saw train when she started to cross in front of it. *Duggan v. Boston & M. R. R. (N. H.)*, 797.
- Of child twelve years old may bar recovery for injury sustained by him through negligence in operation of train. *Coy v. Missouri Pac. Ry. Co. (Kan.)*, 555.

Damages.

- Instruction was erroneous as permitting recovery by plaintiff for loss of work from time of his injury until he came of age, as, until such time, plaintiff's father was entitled to his earnings. *Hayes v. Southern Ry. Co. (N. Car.)*, 547.
- Substantial damages for death of seven year old boy were warranted. *Black v. Michigan Cent. R. Co. (Mich.)*, 777.

Evidence.

- Number and ages of children of injured person. *Bahr v. Northern Pac. Ry. Co. (Minn.)*, 782.
- Railroad was guilty of actionable negligence where train pushed

CHILDREN—Continued.

empty car against seven year old child fishing in defendant's lumber yard, to which all persons desiring to do so were admitted that they might fish in stream which ran through the yard. *Black v. Michigan Cent. R. Co.* (Mich.), 777.

COMMON CARRIERS.

See **CARRIERS; CARRIERS OF LIVE STOCK; CONNECTING CARRIERS; FEDERAL JURISDICTION; RAILROADS.**

Authority of station agent to contract to furnish cars. *Clark v. Ulster & D. R. Co.* (N. Y.), 583.

Carrier, having accepted cotton for transportation, could relieve itself from liability for failure to transport it promptly only by proving it was prevented by act of God, public enemy, conduct of the owner or a special agreement limiting its duty. *Yazoo & M. V. R. Co. v. Blum Co.* (Miss.), 86.

Carrier's agent, who delivered goods to one whose name was the same as that of the consignee, was not chargeable with knowledge that the consignor had been sending goods through the same company for five years, six or seven times a year, addressed in the same way. *Singer v. Merchants' Despatch Transp. Co.* (Mass.), 83.

Consignor, by accepting receipt which provided for delivery without requiring production of receipt or bill of lading, accepted such provision as part of contract. *Singer v. Merchants' Despatch Transp. Co.* (Mass.), 83.

Contributory Negligence.

Shipping apples in bulk in box cars, in November, from New York to Minneapolis. *Calender-Vanderhoof Co. v. Chicago, etc., Ry. Co.* (Minn.), 455.

Contributory negligence in packing freight and failure of carrier to exercise reasonable care to prevent damages. *Calender-Vanderhoof Co. v. Chicago, etc., Ry. Co.* (Minn.), 455.

Conversion.

Tender of freight charges was not necessary before bringing suit for conversion of freight, where there was no refusal by owner to pay what he deemed the proper amount. *Gates v. Bekins* (Wash.), 399.

Damages.

In action for damages to shipment from delay in delivery, court should instruct jury defining measure of damages. *Chicago, etc., R. Co. v. Chestnut Bros.* (Ky.), 108.

One who shipped meal to himself for his cattle was not entitled to recover special damages for loss in weight of the cattle, extra work in attempting to care for them and secure proper feed, arising from further delay by the carrier in delivering the meal, after the lapse of a reasonable time from his giving the carrier notice of the special circumstances making the shipment urgent. *Patterson v. Illinois Cent. R. Co.* (Ky.), 434.

Recovery for outraging feelings by refusing to deliver household goods until certain freight charges are paid. *Gates v. Bekins* (Wash.), 399.

Delay.

Where a carrier failed to deliver promptly, but the shipper's agents in unloading the cargo after it was delivered for unloading were guilty of delay, damages accruing after delivery by the carrier were not chargeable to it, although such damages occasioned by the delay of the agents would not have accrued, but for the carrier's original negligence. *Chicago, etc., R. Co. v. Chestnut Bros.* (Ky.), 108.

COMMON CARRIERS—Continued.**Delivery.**

In an action on contract of shipment for delay in delivering freight, allegation that defendant was guilty of negligence did not convert the action from one *ex contractu* into one *ex delicto*. *Chicago, etc., R. Co. v. Chestnut Bros. (Ky.)*, 108.

Under Ky. St. 1903, § 470, carrier is liable under written contract for failure to deliver cargo promptly, though contract did not state its consideration. *Chicago, etc., R. Co. v. Chestnut Bros. (Ky.)*, 108.

Discrimination.

Burden of proof on plaintiff. *Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 94.

Carrier may not give one customer lower rate for shipment of logs than another, merely because the former ships the manufactured product over the carrier's line. *Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 94.

Evidence was admissible to show rates charged to others for shipments over other branches of the road, it appearing that the conditions were substantially similar. *Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 94.

Question for the jury whether the railroad had practised the alleged discrimination. *Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 94.

Sufficiency of complaint, under certain North Carolina Statute, in action against carrier. *Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 94.

Testimony in regard to shipments from a point without the state to a point within the state was not inadmissible on the ground that such shipments were interstate and not within the control of the state court. *Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 94.

Duty to furnish transportation facilities. *Yazoo & M. V. R. Co. v. Blum Co. (Miss.)*, 86.

Excuses for failure to furnish transportation facilities. *Yazoo & M. V. R. Co. v. Blum Co. (Miss.)*, 86.

Freight destroyed by fire in warehouse after consignee had been notified to remove it, without negligence, carrier not liable. *Murphy v. Southern Ry. Co. (S. Car.)*, 566.

Joint or separate liability of carrier and its agent where latter wrongfully refused to ship cattle by shorter route, and compelled plaintiffs to sign bill of lading providing for shipment by longer route, on which the cattle were damaged. *Eastin & Knox v. Texas & P. Ry. Co. (Tex.)*, 508.

Limiting Liability.

Agreement in shipping contract that no suit for damages should be brought, unless commenced within six months after loss, was void as an attempt to vary the statute of limitations. *Adams Express Co. v. Walker (Ky.)*, 145.

Burden of proving exemption under certain provision of bill of lading. *Louisville & N. R. Co. v. Dunlap (Ala.)*, 453.

Condition that claims for loss or damage to freight shall be made within certain period, validity of. *Union Pac. R. Co. v. Thompson (Neb.)*, 123.

Consent of shipper. *Baltimore & O. R. Co. v. Doyle (C. C. A.)*, 129.

How agreement with shipper must be entered into. *Baltimore & O. R. Co. v. Doyle (C. C. A.)*, 129.

Mere depredator is not a robber. *Louisville & N. R. Co. v. Dunlap (Ala.)*, 453.

No presumption that shipper had knowledge of condition, where there is nothing in its position in the bill of lading or the

COMMON CARRIERS—Continued.

- color or style of type in which it is printed to render it conspicuous, and the question of knowledge in such case is one of fact for the jury. *Baltimore & O. R. Co. v. Doyle* (C. C. A.), 129.
- Validity of stipulation. *Adams Express Co. v. Walker* (Ky.), 145.
- What law governs, carrier's burden of proving. *Adams Express Co. v. Walker* (Ky.), 145.
- Whether or not shipper was negligent in failing to read condition printed on the back of bill of lading is immaterial on an issue as to whether he was bound thereby, which depends entirely on whether he assented to the condition. *Baltimore & O. R. Co. v. Doyle* (C. C. A.), 129.
- Presumption of negligence from loss of freight. *Adams Express Co. v. Walker* (Ky.), 145.
- Where goods were consigned to L. S., Springfield, Ill., whether consignor meant L. S., of Boston, Mass., or L. S., of Springfield, Ill., was not material. *Singer v. Merchants' Despatch Transp. Co.* (Mass.), 83.

CONNECTING CARRIERS.

See **BILLS OF LADING; TICKETS AND FARES.**

- All the carriers were liable for loss or injury to freight in absence of restricted liability stipulation. *St. Louis Southwestern Ry. Co. v. Kilberry* (Ark.), 567.
- Appellant, as connecting carrier, exercised reasonable care in receiving and forwarding a certain car loaded with apples. *Calender-Vanderhoof Co. v. Chicago, etc., Ry. Co.* (Minn.), 455.
- Connecting railroad at Chicago, over which car loaded with apples shipped in bulk in box car is routed in November to Minneapolis, is not required to anticipate that a car so loaded will be delivered upon its yard tracks, and be prepared to immediately transfer the fruit to another car, or send the car to a roundhouse, or take extraordinary precautions to protect the fruit from frost. *Calender-Vanderhoof Co. v. Chicago, etc., Ry. Co.* (Minn.), 455.
- Initial carrier's liability for injury to freight occurring beyond its own line. *Allen & Gilbert-Ramaker Co. v. Can. Pac. Ry. Co.* (Wash.), 75.

Limiting Liability.

- Destination of cars in question being not beyond line of contracting carrier, the provision as to limitation of liability to its own line had no application. *St. Louis Southwestern Ry. Co. v. Kilberry* (Ark.), 567.
- Provision in fine print, somewhat obscured by stamps, purporting to limit initial carrier's liability to its own line, could not be regarded as part of contract. *Allen & Gilbert-Ramaker Co. v. Can. Pac. Ry. Co.* (Wash.), 75.
- Undertaking to transport goods, even beyond carrier's line, implied from its acceptance of them. *St. Louis S. W. Ry. Co. v. Kilberry* (Ark.), 567.
- Where bill of lading issued for through shipment showed it was a contract for a through shipment, the connecting carrier became a party to it by adoption and ratification. *Chicago, etc., R. Co. v. Chestnut Bros.* (Ky.), 108.

CONNECTIONS.

See **RAILROADS.**

CONSTITUTIONAL LAW.

See **FELLOW SERVANTS; INTERSTATE COMMERCE; RAILROADS; STREET RAILWAYS; TAXATION; TICKETS AND FARES.**

CONSTRUCTION COMPANIES.

See FELLOW SERVANTS.

CONTRACTORS.

See INDEPENDENT CONTRACTORS.

CONTRACTS.

See CARRIERS.

CONTRIBUTION.

See CARRIERS OF PASSENGERS.

CONTRIBUTORY NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; FIRES SET BY LOCOMOTIVES; IMPUTED NEGLIGENCE; PERSONAL INJURIES; RAILROADS IN STREETS; STATIONS AND DEPOTS.

CORPORATIONS.

See STREET RAILWAYS.

COUPLING CARS.

See MASTER AND SERVANT.

CROSSINGS.

See CHILDREN; EMINENT DOMAIN; IMPUTABLE NEGLIGENCE; RAILROADS.

Care due persons crossing railroad tracks. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

Contributory Negligence.

As the car in question was operated on street, it could not be said that the driver of wagon with which it collided did not exercise reasonable judgment in determining that he could pass the crossing before the car would reach him. *Forsythe v. Los Angeles Ry. Co.* (Cal.), 447.

One approaching crossing to take train is bound to know it is a place of danger. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

Engineer's failure to sooner stop train was proximate cause of death of nine year old child. *Duggan v. Boston & M. R. R.* (N. H.), 797.

Evidence was sufficient to sustain finding in favor of plaintiff. *Southern Ry. Co. v. King* (Ga.), 785.

Speed in violation of ordinance as negligence. *Erie R. Co. v. Farrell* (C. C. A.), 551.

Stop, Look, and Listen.

Care required of highway traveler as affected by his knowledge that flagman is not at his post. *Hodgin v. Southern Ry. Co.* (N. Car.), 553.

CUSTOM AND USAGE.

See EVIDENCE; MASTER AND SERVANT; NEGLIGENCE.

DAMAGES.

See BAGGAGE; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; COMMON CARRIERS; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; MASTER AND SERVANT; PERSONAL INJURIES; RAILROADS IN STREETS; STREET RAILWAYS; TRESPASSERS.

DEATH BY WRONGFUL ACT.

See EMPLOYERS' LIABILITY ACTS.

Damages.

- Excessive verdict for death of child. *Black v. Michigan Cent. R. Co. (Mich.)*, 777.
- Measure and elements. *MacFeat v. Philadelphia, etc., R. Co. (Del. Sup'r Ct.)*, 56.
- Measure of, erroneous instruction. *Illinois Cent. R. Co. v. Johnson (Ill.)*, 213.
- Punitive damages under laws of Kentucky. *Illinois Cent. R. Co. v. Sheegog's Adm'r (Ky.)*, 672.

Evidence.

- Declarations of deceased, cumulative testimony as to. *Weeks v. Boston Elevated Ry. Co. (Mass.)*, 177.
- Question asked witness to show that the life of plaintiff's decedent was of more value than that of a careless man, etc., was too general. *MacFeat v. Philadelphia, etc., R. Co. (Del. Sup'r Ct.)*, 56.
- Transitory action for negligence of railroad. *Denver & R. G. R. Co. v. Warring (Colo.)*, 531.

DISCRIMINATION.

See MONOPOLIES.

DOGS.

See CARRIERS OF PASSENGERS.

DRUNKENNESS.

See CARRIERS OF PASSENGERS.

EMINENT DOMAIN.

See RAILROADS IN STREETS; STREET RAILWAYS.

- Abutting owner's right to damages because of location and operation of railroad upon highway. *Scrutchfield v. Choctaw, O. & W. R. Co. (Okl.)*, 768.

Benefits.

- Benefits to land not taken by railroad. *Cox v. Philadelphia, etc., R. Co. (Pa.)*, 249.

Damages.

- Certain facts were insufficient to show injury to owner of land on the river between proposed intake and outlet of lake in question, in that the water in the river would not be permitted to flow across the land as it was accustomed to flow by nature. *State v. Olympia L. & P. Co. (Wash.)*, 757.
- Effect of improper argument of counsel. *City of Detroit v. C. H. Little Co. (Mich.)*, 234.
- Elements of damages to leasehold from separation of street and railroad crossing grades. *City of Detroit v. C. H. Little Co. (Mich.)*, 234.
- Elements of damages where crossings over spur tracks of another company are condemned. *Kansas City, etc., Ry. Co. v. Louisiana W. R. Co. (La.)*, 8.
- In condemnation of land used for raising ducks, railroad cannot show that such use would pollute stream passing through it to injury of lower riparian owners. *Cox v. Philadelphia, etc., R. Co. (Pa.)*, 249.
- May have damages assessed on basis of most valuable use to which land may be adapted. *Cox v. Philadelphia, etc., R. Co. (Pa.)*, 249.
- Measure of where part of tract of land is taken or injured by railroad. *Cox v. Philadelphia, etc., R. Co. (Pa.)*, 249.

EMINENT DOMAIN—Continued.

- Special value of land for certain business, and prospective profits from such business as elements. *Cox v. Philadelphia, etc., R. Co. (Pa.)*, 249.
- Harmless error where erroneous theory of damages. *Abbott v. Milwaukee Light, H. & T. Co. (Wis.)*, 19.
- Intention to condemn land for temporary purpose only, insufficiency of evidence of. *State of Olympia L. & P. Co. (Wash.)*, 757.
- Measure. *Cox v. Philadelphia, etc., R. Co. (Pa.)*, 249.
- Mere fact that charter for railroad has been granted to a corporation does not, conclusively, establish its right to take land for its use. *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co. (W. Va.)*, 761.
- Power of railroad to exercise right. *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co. (W. Va.)*, 761.
- Preliminary injunction on bill by township to enjoin railroad from appropriating portion of road to straighten and widen railroad will not be granted. *Crescent Tp. v. Pittsburg & L. E. R. Co. (Pa.)*, 756.
- Presumption on appeal that jury followed instructions as to damages. *Abbott v. Milwaukee Light, H. & T. Co. (Wis.)*, 19.
- Prima facie right of railroad to exercise power. *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co. (W. Va.)*, 761.

Public Use.

- If a particular use is declared by the Legislature to be a public one, courts will hold it to be public, unless it plainly appears not to be such. *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co. (W. Va.)*, 761.
- Right to condemn crossings over spur tracks of another company. *Kansas City, etc., Ry. Co. v. Louisiana W. R. Co. (La.)*, 8.
- Route of railroad through mountainous and sparsely settled country. *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co. (W. Va.)*, 761.
- Street railway's right to exercise power was not affected by fact that it was authorized to furnish power to individuals. *State v. Olympia L. & P. Co. (Wash.)*, 757.
- Value of attorney's fees. *Hall v. Wabash R. Co. (Iowa)*, 670.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS; LICENSEES.

- Application of Miss. Const. 1890, § 193, partially abrogating fellow servant rule as to "railroad corporations." *Bradford Construction Co. v. Heflin (Miss.)*, 483.
- Comp. Laws, N. Mex., § 3216, conferred right of action by personal representatives for death of railroad employer caused by his railroad's failure to employ and select a sufficient number of competent men to properly guard their track against rock falling from hillsides adjoining right of way. *Denver & R. G. R. Co. v. Warring (Colo.)*, 531.

EVIDENCE.

See CARRIERS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CHILDREN; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; INTOXICATING LIQUOR; MASTER AND SERVANT; PERSONAL INJURIES.

- Conclusion of witness. *Pierson v. Illinois Cent. R. Co. (Mich.)*, 591.

Expert Testimony.

Question as to whether deceased's injuries and the shock were such as would have been caused by being struck by an express

EVIDENCE—Continued.

- train going at the rate of 25 or 30 miles an hour and his body being rolled or crushed under the running board of a shifting engine, was not a proper one for an expert to answer. *MacFeat v. Philadelphia, etc., R. Co. (Del. Sup'r Ct.)*, 56.
- Lasting effect of oil poured over goods. *Louisville & N. R. Co. v. Dunlap (Ala.)*, 453.

Opinion Evidence.

- Opinion of experienced witness. *Pittsburg, etc., Ry. Co. v. Nicholas (Ind.)*, 230.
- Photograph of scene of accident. *MacFeat v. Philadelphia, etc., R. Co. (Del. Sup'r Ct.)*, 56.
- Question asked witness, for the purpose of showing a custom on defendant's part of standing a shifting engine and one or more cars in front of the station at the time of the approach of the passenger train to act as a fence to keep people back off the dangerous station platform, was inadmissible. *MacFeat v. Philadelphia, etc., R. Co. (Del. Sup'r Ct.)*, 56.
- Question asked witness was inadmissible as calling for a conclusion of fact. *MacFeat v. Philadelphia, etc., R. Co. (Del. Sup'r Ct.)*, 56.
- Speed ordinances. *MacFeat v. Philadelphia, etc., R. Co. (Del. Sup'r Ct.)*, 56.

EXEMPTION FROM LIABILITY.

See CARRIERS OF PASSENGERS; LIMITING LIABILITY.

EXPERT TESTIMONY.

See EVIDENCE.

EXPRESS COMPANIES.

See INTOXICATING LIQUORS.

EXPRESS MESSENGERS.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

FEDERAL JURISDICTION.

- Jurisdictional amount where controversy is between state corporation commission and railroad, and involves right to enforce certain penalties, and also the company's right to carry on interstate commerce. *McNeill v. Southern Ry. Co. (U. S.)*, 285.
- Removal of cause from state court on ground of separable controversy where plaintiff has elected to sue jointly foreign corporation and its servants whose misconduct caused the injury complained of. *Alabama Great Southern Ry. Co. v. Thompson (U. S.)*, 292.
- Removal of cause to federal court where cause of action is stated against citizen defendant alleged to have been fraudulently joined with a noncitizen. *Eastin & Knox v. Texas & P. Ry. Co. (Tex.)*, 508.
- Suit in which the matter in dispute is the right to have consignment shipped by common carrier to its destination involves a valuable right, measurable in money, and therefore satisfies requirements of act of March 3, 1885, conferring upon the Supreme Court of the United States certain appellate jurisdiction. *New Mexico v. Denver, etc., R. Co. (U. S.)*, 403.
- Suit to restrain state railroad commission from interfering with property and interstate business of railroad was not one against the state. *McNeill v. Southern Ry. Co. (U. S.)*, 285.

FELLOW SERVANTS.

- Application of Miss. Const. 1890, § 193, partially abrogating the fellow servant rule as to "railroad corporations." *Bradford Construction Co. v. Heflin (Miss.)*, 483.

FELLOW SERVANTS—Continued.

Constitutionality of Miss. Const. 1890, § 193, partially abrogating fellow servant rule as to "railroad corporations." *Bradford Construction Co. v. Heflin* (Miss.), 483.

Construction company, authorized to own, but not operate, railroad, is not a "railroad corporation" within wording of Miss. Const. 1890, § 193, partially abrogating fellow servant rule. *Bradford Construction Co. v. Heflin* (Miss.), 483.

Employee of coal company killed by negligence of trainmen was fellow servant of the latter, within Pa. Act, April 4, 1868. *Miller v. Northern Cent. Ry. Co.* (Pa.), 481.

In joint action by servant against railroad company and construction company, by whom he was employed, and no appeal was taken from a judgment in favor of the railroad, plaintiff, on an appeal by the construction company, could not contend that the two companies were practically one, and that, therefore, he was an employee of the railroad and the doctrine of fellow servant as applicable to the construction company did not arise. *Bradford Construction Co. v. Heflin* (Miss.), 483.

One employed to shovel dirt from between cars was fellow servant of engineer. *Bradford Construction Co. v. Heflin* (Miss.), 483.

Recovery for injury to brakeman, sustained while making a coupling, depended upon whether conduct of engineer was willful or wanton, and he was conscious of its probable effects. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Where, through overwork and loss of sleep, motorman failed to observe rule requiring him to keep 100 feet behind preceding car, and collided with it, injuring its motorman, the company may not interpose his non-compliance with the rule as fellow servant's negligence. *Ft. Wayne, etc., Trac. Co. v. Crosbie* (Ind.), 749.

FERRIES.

See CARRIERS OF PASSENGERS; TICKETS AND FARES.

FIRES.

See CARRIERS.

FIRES SET BY LOCOMOTIVES.

See LEASES AND RUNNING POWERS.

Burden and measure of proof where railroad seeks to overcome prima facie proof of negligence created by Rev. St. Ohio 1906, § 3365-6. *Toledo, etc., R. R. v. Star Flouring Mills Co.* (C. C. A.), 557.

Civ. Code S. Car. 1902, § 2135, was not applicable where fire was started by negligence of subboss of railroad bridge and trestle crew, while using boarding car as sleeping place during the night, when not on duty, and therefore the railroad was not liable. *Southern Ry. Co. v. Power Fuel Co.* (C. C. A.), 800.

Contributory Negligence.

Allowing dry grass, etc., to remain in field. *Walker v. Chicago, etc., Ry. Co.* (Kan.), 774.

Farmers are not required to take unusual precautions against loss from railroad's negligence. *Walker v. Chicago, etc., Ry. Co.* (Kan.), 774.

Evidence.

Evidence of other fires was admissible in rebuttal. *Toledo, etc., R. R. v. Star Flouring Mills Co.* (C. C. A.), 557.

Railroad was not liable for fire set by subboss of trestle crew while he was sleeping in railroad's boarding car, when not on duty. *Southern Ry. Co. v. Power Fuel Co.* (C. C. A.), 800.

FLAG STATIONS.

See STATIONS AND DEPOTS.

FOREIGN CORPORATIONS.

See RAILROADS.

FREE PASS.

See BAGGAGE.

FREIGHT.

See CARRIERS.

FREIGHT TRAINS.

See CARRIERS OF PASSENGERS.

HIGHWAYS.

See EMINENT DOMAIN.

HOSPITALS.

See RELIEF ASSOCIATIONS.

IMPUTED NEGLIGENCE.

Negligence of husband at railroad crossing not imputable to his wife, injured while in vehicle driven by him. *Southern Ry. Co. v. King* (Ga.), 785.

INDEPENDENT CONTRACTORS.

Employer's liability. *White River Ry. Co. v. Batesville & Win. Tel. Co.* (Ark.), 313.

Liability of employer as affected by his partial control of work. *Bahr v. Northern Pac. Ry. Co.* (Minn.), 782.

INJUNCTIONS.

See EMINENT DOMAIN; STREET RAILWAYS.

INSPECTION LAW.

See INTERSTATE COMMERCE.

INSTRUCTIONS.

See CARRIERS OF LIVE STOCK; NEGLIGENCE; INTERSECTIONS; RAILROADS.

INTERSTATE COMMERCE.

See COMMON CARRIERS; FEDERAL COURTS; INTOXICATING LIQUOR; MONOPOLIES.

Intervention by railroad where car is attached before it is unloaded of interstate freight. *Shore & Bro. v. Baltimore & O. R. Co.* (S. Car.), 578.

Right to exact rates scheduled with Interstate Commerce Commission, where lower rate was quoted by the carrier to the shipper, who shipped under the lower rate quoted. *Texas & Pac. Ry. Co. v. Mugg & Dryden* (U. S.), 91.

S. Car. Civ. Code, 1902, vol. 1, §§ 1701, 2176, and Laws 1903, Act No. 1, requiring carrier to trace freight, etc., is not an unconstitutional interference with interstate commerce. *Skipper v. Seaboard Air Line Ry.* (S. Car.), 306.

State interference where railroad commission ordered railroad to deliver cars containing interstate shipments to a private siding. *McNeill v. Southern Ry. Co.* (U. S.), 285.

Texas statute penalizing the failure of a railroad to furnish cars promptly, etc., is an interference with interstate commerce. *Houston & Texas Cent. R. Co. v. Mayes* (U. S.), 50.

To prohibit by state statute the running of freight trains on Sunday

INTERSTATE COMMERCE—Continued.

is a lawful exercise of the police power, and not an interference with interstate commerce, though it prevents the passage of trains to and from other states. *Seal v. State* (Ga.), 378.

Validity of prohibition against receipt by common carriers for transportation beyond limits of New Mexico of hides which do not bear evidence of inspection as required by N. Mex. act of March 19, 1901. *New Mexico v. Denver, etc., R. Co.* (U. S.), 403.

What constitutes. *Shore & Bro. v. Baltimore & O. R. Co.* (S. Car.), 578.

INTOXICATING LIQUORS.

In prosecution under Kentucky local option law, where an interstate shipment of liquor is involved, the rules laid down by the United States Supreme Court must control. *Louisville & N. R. Co. v. Commonwealth* (Ky.), 572.

On question of good faith of express company, in prosecution against railroad company for permitting express company having office in defendant's building to sell liquor in violation of law, state should be permitted to show the general manner in which the business of the office was conducted. *Louisville & N. R. Co. v. Commonwealth* (Ky.), 572.

Proof that an express company delivered whiskey which had not been ordered and collected for it in local option county, while showing a sale there of whiskey, was not conclusive, defendant railroad being entitled to set up certain defenses to a prosecution under Ky. St. 1903, § 2572. *Louisville & N. R. Co. v. Commonwealth* (Ky.), 572.

Railroad cannot be fined, under certain Kentucky statute for permitting express company, having its office in railroad's building, to deliver whiskey and collect money for it, where express company was authorized by law so to do. *Louisville & N. R. Co. v. Commonwealth* (Ky.), 572.

Transportation of certain consignment of liquor from office of express company to a certain building was part of a continuous interstate shipment. *State v. Intoxicating Liquors* (Me.), 273.

While liquor continues to be recognized as a legitimate subject of interstate commerce, section 31 of chapter 27 Me. Rev. St. of 1903, so far as it applies to interstate commerce transportation, must be deemed incompatible with interstate commerce clause of federal constitution. *State v. Intoxicating Liquors* (Me.), 273.

JOINT LIABILITY.

See CARRIERS OF PASSENGERS; COMMON CARRIERS; MASTER AND SERVANT.

JOINT WRONGDOERS.

See CARRIERS OF PASSENGERS.

JURISDICTION.

See FEDERAL JURISDICTION.

JURORS.

See TRIAL.

LACHES.

See RAILROADS IN STREETS.

LEASEHOLD.

See EMINENT DOMAIN.

LEASES AND RUNNING POWERS.

See LOGGING RAILROADS.

Joinder of companies jointly operating their railroads, in action for

LEASES AND RUNNING POWERS—Continued.

- negligent injury to passenger. *Carleton v. Yadkin R. Co.* (N. Car.), 423.
- Lease of portion of right of way with view to securing freight is not contrary to public policy. *City of Detroit v. C. H. Little Co.* (Mich.), 234.
- Lessor's liability for injury to passenger from negligence of lessee's servants. *Carleton v. Yadkin R. Co.* (N. Car.), 423.
- Liability of lessor railroad for injury to employee of lessee, sustained through failure to light railroad yard. *Travis v. Kansas City, etc., Ry. Co.* (La.), 694.
- Liability of lessor to lessee's servants. *Illinois Cent. R. Co. v. Sheegog's Adm'r* (Ky.), 672.
- Parties defendant in action against railroad for negligence of company using its tracks by permission. *St. Louis, etc., Ry. Co. v. Chappell & Billingsley* (Ark.), 789.
- Railroad permitting log company to make joint use of its tracks, but not under lease, was liable for loss by fire started by log company's locomotive. *St. Louis, etc., Ry. Co. v. Chappell & Billingsley* (Ark.), 789.
- Railroad, under Ky. Const., § 203, could not by lease exempt itself from responsibility for torts of itself and lessee. *Illinois Cent. R. Co. v. Sheegog's Adm'r* (Ky.), 672.

LICENSEES.

See CARRIERS OF PASSENGERS; CHILDREN.

- Application of Pa. Act. April 4, 1868, section 1, imposing liability upon a railroad company where a person not its employee is injured while working under certain circumstances. *Hayman v. Philadelphia & R. Co.* (Pa.), 475.
- Plaintiff was within Pa. Act. April 4, 1868, § 1, imposing liability upon railroad company where a person not its employee is injured while working under certain conditions. *Hayman v. Philadelphia & R. Co.* (Pa.), 475.

LIMITATIONS OF ACTIONS.

See COMMON CARRIERS; RAILROADS IN STREETS.

LIMITING LIABILITY.

See BAGGAGE; BILLS OF LADING; CARRIERS; CARRIERS OF PASSENGERS.

LOGGING RAILROADS.

See LEASES AND RUNNING POWERS.

- Defendant lumber company was chargeable with notice of defect in road of railroad company used by it, and was liable for its employee's injuries proximately caused thereby, even though it had no actual previous knowledge or notice thereof. *Arkadelphia Lumber Co. v. Smith* (Ark.), 514.
- Degree of care required of lumber company, as master, in maintaining logging railroad. *Arkadelphia Lumber Co. v. Smith* (Ark.), 514.
- Liability of lumber company, as master, for proper maintenance of railroad used by it but belonging to railroad company. *Arkadelphia Lumber Co. v. Smith* (Ark.), 514.

MAIL CLERKS.

See CARRIERS OF PASSENGERS.

MASTER AND SERVANT.

See COMMON CARRIERS; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; INDEPENDENT CONTRACT-

MASTER AND SERVANT—Continued.

ORS; LOGGING RAILROADS; PERSONAL INJURIES;
RELIEF ASSOCIATIONS; TORTS; WITNESSES.

Appliances.

Degree of care required of master to furnish and maintain appliances for servant to work with. *Southern Ry. Co. v. Carr* (C. C. A.), 699.

Presumption that master furnished servant suitable appliances. *Eliot v. Kansas City, etc., R. Co.* (Mo.), 140.

Presumption that master had performed his duty in furnishing suitable appliances not overcome by proof of mere fact that servant was injured in act of throwing switch lever, nor did such fact amount to proof of failure of master to perform his duty. *Eliot v. Kansas City, etc., R. Co.* (Mo.), 740.

Proof that brakes failed to work at time brakeman was injured did not show they were defective. *Southern Ry. Co. v. Carr* (C. C. A.), 699.

Assumption of Risk.

Brakeman struck by eaves of house projecting over spur track. *Southern Ry. Co. v. Carr* (C. C. A.), 699.

Dangers appreciated by servant. *Kansas City, etc., Ry. Co. v. Loosley* (Kan.), 712.

Deceased fireman's knowledge of defect in bridge, evidence as to was not so conclusive as to require reversal of judgment. *St. Louis, I. M. & S. Ry. Co. v. Mize* (Ark.), 501.

Express messengers on trains. *Robinson v. St. Johnsbury, etc., R. Co.* (Vt.), 630.

Failure to furnish careful co-servants. *Kansas City, etc., Ry. Co. v. Loosley* (Kan.), 712.

Gravel pit work. *O'Neil v. Great Northern Ry. Co.* (Minn.), 696.

Harmless error in instructing as to burden of proof. *Pittsburg, etc., Ry. Co. v. Nicholas* (Ind.), 230.

Instruction was defective for failure to explain difference between contributory negligence and assumption of risk. *Southern Ry. Co. v. Carr* (C. C. A.), 699.

Negligence of superior. *Pittsburg, etc., Ry. Co. v. Nicholas* (Ind.), 230.

Negligent failure of railroad to inspect or maintain track in proper condition. *Denver & R. G. R. Co. v. Warring* (Colo.), 531.

Presumption that servant did not know that appliance was defective. *Eliot v. Kansas City, etc., R. Co.* (Mo.), 740.

Refusal of master to better conditions of work. *Kansas City, etc., Ry. Co. v. Loosley* (Kan.), 712.

Contributory Negligence.

Burden of showing was on defendant master. *Edington v. St. Louis & S. F. R. Co.* (Mo.), 707.

Disobedience of orders in going between cars to make coupling, admissibility of evidence to show. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Going between moving cars to make coupling in violation of rule. *Huggins v. Southern Ry. Co.* (Ala.), 518.

In choosing more dangerous method of making coupling was question for jury. *Edington v. St. Louis & S. F. R. Co.* (Mo.), 707.

In going between cars to make coupling, sufficiency of plea. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Plea of contributory negligence in coupling cars by hand was not subject to the alleged grounds of demurrer. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Presumption that servant was not negligent in failing to know

MASTER AND SERVANT—Continued.

- that appliance was defective. *Eliot v. Kansas City, etc., R. Co. (Mo.)*, 740.
- Replication was defective for failure to show that the order in question was given by one who had authority to order a violation of rule prohibiting brakeman from going between cars to make couplings. *Huggins v. Southern Ry. Co. (Ala.)*, 518.
- Switchman allowing engine to come too close to switch. *Eliot v. Kansas City, etc., R. Co. (Mo.)*, 740.

Damages.

- Instruction that recovery might be had for what injured servants' services had proven to be worth from time of his injury to time he might reasonably expect to live, less what he could earn in his present condition, was properly refused. *Huggins v. Southern Ry. Co. (Ala.)*, 518.

Evidence.

- Declarations and admissions of deceased engineer were excluded, in action against his railroad, by rule laid down in certain decision. *Atlantic Coast Line R. Co. v. Mallard (Fla.)*, 727.
- Necessity of going between cars to make coupling, cross-examination. *Huggins v. Southern Ry. Co. (Ala.)*, 518.
- Proper to let railroad's superintendent testify that the cars in question could have been coupled without plaintiff going between them. *Huggins v. Southern Ry. Co. (Ala.)*, 518.
- Superintendent of defendant's declaration that he should have known better than to put the motorman of the rear car, who was incompetent from overwork, on duty was not part of the *res gestæ*, in action for injury to motorman of other car. *Ft. Wayne, etc., Trac. Co. v. Crosbie (Ind.)*, 749.
- In action against railroad for injury to its brakeman, it was not necessary to allege in complaint that conductor of plaintiff's train knew of plaintiff's perilous position when signal for sudden stopping of the engine was given. *Pittsburg, etc., Ry. Co. v. Nicholas (Ind.)*, 230.
- In action against railroad for injury to its brakeman, the complaint was sufficient to show defendant's conductor owed plaintiff the duty either to cut off the car in question himself or to cause it to be done before giving the signals for the sudden stopping of the engine. *Pittsburg, etc., Ry. Co. v. Nicholas (Ind.)*, 230.
- Instruction was not erroneous as in effect charging that the principal aim of the operation of a railroad was the safety of its employees. *Denver & R. G. R. Co. v. Warring (Colo.)*, 531.
- It was error to permit amendment setting up that the injured brakeman's superior negligently allowed the cars in question to run back while the brakeman was making the coupling. *Huggins v. Southern Ry. Co. (Ala.)*, 518.
- Joint action against master and servant, or either may be sued separately, where injury is caused by negligence of the servant acting in line of his employment. *Whalen v. Pennsylvania R. Co. (N. J.)*, 505.
- Master not liable for acts of servant, committed outside line of his duty and not connected with his master's business, though the particular injury could not have occurred without the facilities afforded by the relation of the servant to his master. *Louisville & N. R. Co. v. Gillen (Ind.)*, 511.
- Negligence in failing to notify switch crew that train would be moved by road engine, instead of by switch engine. *Edington v. St. Louis & S. F. R. Co. (Mo.)*, 707.
- Negligence of injured brakeman's superior in failing to signal engineer to stop or slacken speed of engine before striking detached cars while the brakeman was between them making a coupling was question for jury. *Huggins v. Southern Ry. Co. (Ala.)*, 518.

MASTER AND SERVANT—Continued.

Negligent customs as affecting master's duty to servant. *Pittsburg, etc., Ry. Co. v. Nicholas* (Ind.), 230.

Proximate cause where brakeman was negligent in going between cars in motion and engineer was negligent in backing them at excessive speed. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Proximate cause, where engineer, in moving cars, was taking his signals from brakeman, and did not see signals given by a superintendent, and the brakeman was injured by being caught between the cars, doctrine of prevented recovery for any negligence of the superintendent. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Rules.

Custom superseding rule requiring all orders respecting movements of trains to be in writing. *McCarthy v. Pennsylvania R. Co.* (N. Y.), 684.

Erroneous to deny railroad right to prove that its engineer was killed under circumstances alleged in the pleas, because the "yard limits" were not defined with signboards marked "yard limits," in accordance with rule of the company that such yard limits would be so defined, as by such error case was tried on issue not made by pleadings. *Atlantic Coast Line R. Co. v. Mallard* (Fla.), 727.

Negligence in failing to define "yard limits" by signboards, in accordance with railroad's rule. *Atlantic Coast Line R. Co. v. Mallard* (Fla.), 727.

Order to brakeman from his superintendent to couple certain cars was no implied order to go between them in violation of rule. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Reasonableness of rule prohibiting employees from going between moving cars to couple or uncouple. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Waiver from implied acquiescence in customary violation. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Waiver of rule prohibiting employees from going between moving cars to couple, insufficiency of evidence. *Huggins v. Southern Ry. Co.* (Ala.), 518.

Safe Work Place.

Degree of care required of railroad inspecting to prevent its trainmen from being injured by reason of rocks falling from hillsides upon track. *Denver & R. G. R. Co. v. Warring* (Colo.), 531.

Employee killed by reason of his train striking rock which had fallen from hillside, instruction as to care required of railroad in inspecting, and as to necessity of its negligence being the proximate cause of injury to its servant, was correct. *Denver & R. G. R. Co. v. Warring* (Colo.), 531.

Negligence in permitting eaves of house to project over spur track. *Illinois Cent. R. Co. v. Buchanan* (Ky.), 691.

Negligence of railroad, with respect to inspection, was question for jury where its employee was killed by his train striking a rock which had fallen from hillside. *Denver & R. G. R. Co. v. Warring* (Colo.), 531.

Railroad, through its train dispatcher, was negligent in performance of duty to provide safe work place for fireman killed in a collision. *McCarthy v. Pennsylvania R. Co.* (N. Y.), 684.

Scope of his employment, complaint in action against master was defective for failure to show that servant's act was within. *Louisville & N. R. Co. v. Gillen* (Ind.), 511.

Tracks, duty of railroad, as an employer, to repair. *St. Louis, I. M. & S. Ry. Co. v. Mize* (Ark.), 501.

MASTER AND SERVANT—Continued.**Who Are Employees.**

Employees riding home from work on hand car. *Arkadelphia Lumber Co. v. Smith* (Ark.), 514.

MENTAL ANGUISH.

See PERSONAL INJURIES.

MONOPOLIES.

Validity of contract between railroad and person undertaking to create and develop a milk transportation business, entered into by railroad for purpose of increasing the business of its road. *Delaware, etc., R. Co. v. Kutter* (C. C. A.), 385.

MUNICIPAL CORPORATIONS.

See RAILROAD AID.

Works of internal improvement. *Bird v. City of Detroit* (Mich), 643.

MUNICIPAL OWNERSHIP.

See STREET RAILWAYS.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; EMPLOYERS' LIABILITY ACTS; FIRES SET BY LOCOMOTIVES; IMPUTED NEGLIGENCE; LEASES AND RUNNING POWERS; LOGGING RAILROADS; MASTER AND SERVANT; STATIONS AND DEPOTS; TRESPASSERS; VARIANCE.

Argumentative instruction. *Mobile Light & R. Co. v. Walsh* (Ala.), 114.

Customary methods. *Pittsburg, etc., Ry. Co. v. Nicholas* (Ind.), 230.

Defendant is liable only for such negligence as was the proximate or immediate cause of injury. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

Duty of railroad to give warning of approach of trains, and regulate their speed, according to circumstances. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

Instruction charging negligence not alleged as ground for recovery. *Pierson v. Illinois Cent. R. Co.* (Mich.), 591.

Instruction erroneous for assuming that certain act was negligent. *Illinois Cent. R. Co. v. Johnson* (Ill.), 213.

Instruction was properly refused as seeking to recover irrespective of whether defect in question was proximate cause of plaintiff's injury. *Huggins v. Southern Ry. Co.* (Ala.), 518.

"Ordinary care," meaning of when applied to management of locomotives and cars in motion. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

Proximate cause, definition of. *Hayes v. Southern Ry. Co.* (N. Car.), 547.

Pure accident is not actionable. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

Recklessness equivalent to willfulness or intentional wrong. *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 460.

Recovery may be had on proof of injury, from one or more of the negligent acts alleged. *Ft. Wayne, etc., Trac. Co. v. Crosbie* (Ind.), 749.

Speed in violation of ordinance. *Erie R. Co. v. Farrell* (C. C. A.), 551.

Speed of train within city in excess of that permitted by ordinance. *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 56.

NEGLIGENCE—Continued.

Sufficiency of complaint, in action against carrier, under Idaho Rev. St. 1887, subd. 2, § 4168. *Lindsay v. Oregon Short Line R. Co.* (Idaho), 616.

Wantonness, definition of. *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 460.

NOTICE OF CLAIMS.

See CARRIERS OF LIVE STOCK.

NUISANCES.

Railroad should be permitted to avoid perpetual injunction to restrain it from erecting certain freight house in a city by constructing suitable gates and providing gatemen as usual and customary at dangerous crossings. *City of Hickory v. Southern Ry.* (N. Car.), 656.

OPINION EVIDENCE.

See PERSONAL INJURIES.

ORDINANCES.

See ACCIDENTS ON TRACK; CROSSINGS; EVIDENCE; NEGLIGENCE; STREET RAILWAYS.

ORDINARY CARE.

See NEGLIGENCE.

PAIN.

See PERSONAL INJURIES.

PARTIES.

See LEASES AND RUNNING POWERS.

PASSENGERS.

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PENAL ORDINANCES.

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PENAL STATUTES.

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PENALTIES.

See INTOXICATING LIQUORS.

PERSONAL INJURIES.

See CARRIERS; CHILDREN; CROSSINGS; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; RAILROADS IN STREETS; TRESPASSERS.

Damages.

Certain facts were sufficient to justify recovery for depreciated future earning capacity. *Chicago Con. Traction Co. v. Schritter* (Ill.), 442.

Correct instructions. *Chicago, etc., Ry. Co. v. Stibbs* (Okla.), 427.

Error in admitting evidence as to a certain element of damages was harmless, where plaintiff's counsel stated all claims for such damages were abandoned. *Mobile Light & R. Co. v. Walsh* (Ala.), 114.

Evidence of average monthly earnings of injured person. *Chicago, etc., Ry. Co. v. Stibbs* (Okla.), 427.

Loss of earnings. *Chicago, etc., Ry. Co. v. Stibbs* (Okla.), 427.

Medical expenses and other elements. *Clark v. Durham Traction Co.* (N. Car.), 166.

PERSONAL INJURIES—Continued.

Mental anguish. *Bahr v. Northern Pac. Ry. Co. (Minn.)*, 782.
Mental suffering. *Chicago Con. Traction Co. v. Schritter (Ill.)*, 442.

Proper to refuse to instruct that one element of damages was wounded feelings of the injured servant, his physical and mental suffering; and that, there was no measure of proof of such damages, and it was a matter of inference to be drawn by the jury from the manner and carelessness of the wrong. *Huggins v. Southern R. Co. (Ala.)*, 518.

Where plaintiff testified that he was a teacher and civil engineer, he was entitled to testify as to the market value of his services. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 38.

Evidence.

Expressions of pain. *Weeks v. Boston Elevated Ry. Co. (Mass.)*, 177.

Number and ages of plaintiff's children, harmless error. *Bahr v. Northern Pac. Ry. Co. (Minn.)*, 782.

Testimony of daughter of plaintiff to the effect that he was unable to do anything was not objectionable on ground that witness was not shown to be an expert. *Mobile Light & R. Co. v. Walsh (Ala.)*, 114.

PHOTOGRAPHS.

See EVIDENCE.

PLEADING.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT; NEGLIGENCE; TICKETS AND FARES.

POLICE POWER.

See INTERSTATE COMMERCE.

PRESUMPTIONS.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT; NEGLIGENCE.

PRIVATE RAILROADS.

See LOGGING RAILROADS.

PROXIMATE CAUSE.

See CROSSINGS; NEGLIGENCE; TRESPASSERS.

PURCHASERS.

See RAILROADS.

RAILROAD AID.

Recovery of money paid railroad by town notwithstanding town's acceptance of benefits. *Town of Luxora v. Jonesboro, Lake City & E. R. Co. (Ark.)*, 641.

Remedy of town seeking recovery of money illegally paid railroad as inducement to build its road into the town. *Town of Luxora v. Jonesboro, Lake City & E. R. Co. (Ark.)*, 641.

Town cannot by acceptance of benefits from construction of railroad ratify void ordinance appropriating money for railroad. *Town of Luxora v. Jonesboro, Lake City & E. R. Co. (Ark.)*, 641.

RAILROAD COMMISSIONS.

See FEDERAL COURTS.

RAILROADS.

See ATTORNEYS; CARRIERS; FELLOW SERVANTS; INTOXICATING LIQUORS; LEASES AND RUNNING POWERS; LOGGING RAILROADS; NEGLIGENCE; NUISANCES; RIGHT OF WAY; STREET RAILWAYS.

Application of constitutional declaration that all railroads are public highways and all railroad companies are common carriers.

Kansas City, etc., Ry. Co. v. Louisiana W. R. Co. (La.), 8.

Application of Rev. St. Ohio, § 3300, providing for the subjection of successor railroads to obligations of their predecessors. Rice v.

Norfolk & W. Ry. Co. (C. C. A.), 659.

Enjoining company from tearing up its track for purpose of relocating line, defenses. Brown v. Atlantic & B. Ry. Co. (Ga.), 255.

Foreign railroad, what on its part constitutes doing business within state. Berger v. Pennsylvania R. Co. (R. I.), 665.

Injunction to require relaying of tract which company had torn up for purpose of changing route without authority. Brown v. Atlantic & B. Ry. Co. (Ga.), 255.

Location of route, right to change without legislative authority. Brown v. Atlantic & B. Ry. Co. (Ga.), 255.

Relocation of line, existence of legislative authority. Brown v. Atlantic & B. Ry. Co. (Ga.), 255.

Remedies of individual specially injured by act of railroad in tearing up its track for purpose of changing route without authority.

Brown v. Atlantic & B. Ry. Co. (Ga.), 255.

Right of individual to apply for injunction to prevent railroad from tearing up track for purpose of changing route without authority.

Brown v. Atlantic & B. Ry. Co. (Ga.), 255.

Right to tear up track and relocate line. Brown v. Atlantic & B. Ry. Co. (Ga.), 255.

Scope of constitutional right to intersect, connect with, or cross any other railroad. Kansas City, etc., Ry. Co. v. Louisiana W. R. Co. (La.), 8.

Under Kirby's Dig., § 6569, providing that a railroad company before constructing part of its road shall file a map, it is liable for damages from its destruction of the line of a telegraph company in clearing its right of way before filing the map. White River Ry. Co. v. Batesville & Win. Tel. Co. (Ark.), 313.

RAILROADS IN STREETS.

See EMINENT DOMAIN.

Abutter's cause of action for damages to his property did not arise until the change in the use to which the railroad was put. Grossman v. Houston, etc., Ry. Co. (Tex.), 25.

Contributory Negligence.

Standing on track in street without necessity bars recovery for injury from moving car not knowingly or wantonly caused. Coy v. Missouri Pac. Ry. Co. (Kan.), 555.

Damages.

Depreciation in value of lot caused by operation of railroad. Grossman v. Houston, etc., Ry. Co. (Tex.), 25.

Effect of laches of property owner in permitting railroad to expend work and money in encroaching upon his rights. Beers v. Chicago, etc., Ry. Co. (C. C. A.), 30.

Personal inconvenience and discomfort to abutting owner caused by operation of railroad cannot give rise to a cause of action. Grossman v. Houston, etc., Ry. Co. (Tex.), 25.

RECKLESSNESS.

See NEGLIGENCE; TICKETS AND FARES.

RELIEF ASSOCIATIONS.

Railroad company was liable to its employee, injured by reason of failure of railroad hospital organization, an independent corporation, to select skillful and competent physicians and attendants. *Illinois Cent. R. Co. v. Buchanan* (Ky.), 691.

REMOVAL OF CAUSE.

See **FEDERAL JURISDICTION.**

RIGHT OF WAY.

See **ADVERSE POSSESSION; EMINENT DOMAIN; LEASES AND RUNNING POWERS; RAILROADS.**

Deed excepting that part of land occupied by railroad right of way excepted the soil itself, and not merely the right of way. *Hall v. Wabash R. Co.* (Iowa), 670.

Deed of right of way gives railroad no more rights than it would have acquired to such land by condemnation. *Shepard v. Suffolk & C. R. Co.* (N. Car.), 28.

Reversion upon abandonment of railroad right of way. *Hall v. Wabash R. Co.* (Iowa), 670.

Where railroad builds its road upon land of another without other authority than parol license, the owner may ordinarily revoke such license at any time, and sue for possession. *Johanson v. Atlantic City R. Co.* (N. J.), 668.

RULES AND REGULATIONS.

See **CARRIERS; MASTER AND SERVANT.**

SCALPERS.

See **TICKETS AND FARES.**

SIGNALS.

See **NEGLIGENCE.**

SPEED.

See **CROSSINGS; NEGLIGENCE.**

SPURS AND SIDETRACKS.

See **EMINENT DOMAIN.**

STATIONS AND DEPOTS.**Contributory Negligence.**

In action for injuries to plaintiff's team from being struck by train at depot, in view of evidence that he was directed by defendant's baggageman to leave the horses unattended where he did, it was not error to leave the question of his contributory negligence to the jury. *Bankman v. Pere Marquette R. Co.* (Mich.), 136.

Degree of care required in equipment of stations. *Crowe v. Michigan Cent. R. Co.* (Mich.), 191.

Duty to provide safe platform at flag station. *Pincus v. Atlantic Coast Line R. Co.* (N. Car.), 112.

Hole six inches deep in station platform as negligent defect. *Crowe v. Michigan Cent. R. Co.* (Mich.), 191.

STOCK, INJURIES TO.

See **CATTLE GUARDS; STATIONS AND DEPOTS.**

STREET RAILWAYS.

See **ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; EMINENT DOMAIN.**

Additional Servitude.

Use of street by electric railroad for interurban traffic. *Abbott v. Milwaukee Light, H. & T. Co.* (Wis.), 19.

STREET RAILWAYS—Continued.

Authority of city to own and lay street car tracks to be leased and used by private street railway corporations for hire. *Bird v. City of Detroit* (Mich.), 643.

Certain ordinance requiring the running of sufficient number of cars to prevent crowding, the furnishing of heat therein, etc., was within police power of city. *Chicago v. Chicago City Ry. Co.* (Ill.), 240.

Damages.

Measure of damages to abutting premises where appropriation of street by electric railroad for interurban travel. *Abbott v. Milwaukee Light, H. & T. Co.* (Wis.), 19.

Forfeiture of franchise, right of town to declare. *Millcreek Tp. v. Erie Rapid Transit St. Ry. Co.* (Pa.), 266.

Mere invalidity of ordinance, under which certain street railways were prosecuted to recover penalties, affords no ground for the issuance of an injunction to restrain such prosecution. *Chicago v. Chicago City Ry. Co.* (Ill.), 240.

Municipal construction and ownership of street railway as a work of internal improvement prohibited by Mich. Const., art. 14, § 9. *Bird v. City of Detroit* (Mich.), 643.

Regulation of by city, power to pass certain ordinance. *Chicago v. Chicago City Ry. Co.* (Ill.), 240.

Remedies of defendants where invalidity of city ordinance under which suits for separate penalties were brought against certain railways had not been determined at law, and its invalidity was uncertain. *Chicago v. Chicago Ry. Co.* (Ill.), 240.

Who may question corporate power to place advertisement inside of cars. *Burns v. St. Paul City Ry. Co.* (Minn.), 623.

STREETS AND HIGHWAYS.

See RAILROADS.

TAXATION.

See RAILROAD AID.

Due process of law in railroad taxation is not denied by N. Y. Laws 1896, chap. 908, § 182, merely because a large part of a company's rolling stock is always absent from the state. *People v. Miller* (U. S.), 280.

Exemptions.

Constitutionality of Mich. Laws, 1855, p. 305, § 9, creating taxation contract between state and railroad company, which formally accepted its taxation provision, and made large expenditures, and completed an unfinished railroad, to induce which was the motive for the enactment; such taxation contract preventing the subjection of the property of the company to any other than the tax prescribed by such statute. *Powers v. Detroit, etc., Ry. Co.* (U. S.), 1.

Interstate commerce is not illegally interfered with by the franchise tax imposed upon a domestic railway corporation by N. Y. Laws 1896, Chap. 908, § 182, merely because no deduction is allowed on account of rolling stock being always absent from the state. *People v. Miller* (U. S.), 280.

TICKETS AND FARES.

Coupon ticket for transportation over several lines, it was not necessary for injured passenger to show that defendant carrier's share of ticket's price was the amount alleged in his complaint. *Pittsburg, etc., Ry. Co. v. Higgs* (Ind.), 201.

Evidence.

Certain facts were admissible to show recklessness and disregard

TICKETS AND FARES—Continued.

of plaintiff's rights in selling her a ticket which showed on its face that it was intended to have coupons attached, and no coupons were attached. *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 460.

Posters and advertisements purporting to limit use of tickets. *Crabtree v. Washington County Ry. Co.* (Me.), 472.

Excursion Tickets.

Limitation of use, construction of certain conditions as affected by Me. Rev. St. c. 53, § 2. *Crabtree v. Washington County Ry. Co.* (Me.), 472.

Fact that conductor over connecting line passed the coupon ticket in question on the outgoing trip, did not bind such connecting line, so as to require another conductor on same road to receive it on the return trip. *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 460.

Failure to provide for redemption of passenger tickets, carrier was liable under Iowa Code Supp. 1902, §§ 2128a, 2128c, the mere fact that the station agent, who was absent at the time in question, had been authorized to redeem tickets being no defense. *Rohrig v. Chicago, etc., Ry. Co.* (Iowa), 199.

Identification of Passenger.

Instruction was erroneous because charging carrier with negligence not alleged, and because it furnished a ground for recovery whether the regulation was or was not reasonably enforced. *Pierson v. Illinois Cent. R. Co.* (Mich.), 591.

Regulation must not be unreasonably enforced. *Pierson v. Illinois Cent. R. Co.* (Mich.), 591.

Sufficiency of to satisfy requirement of ticket. *Southern Ry. Co. v. Cassell* (Ky.), 33.

Intention of Legislature by enactment of Me. Rev. St., c. 52, § 2, was to require railroads to state "on the ticket" all the limitations of its use other than the six-year limitations imposed by the statute. *Crabtree v. Washington County Ry. Co.* (Me.), 472.

Liability of railroad selling ticket, good for entire trip, for injury sustained by passenger on connecting ferry. *Prethrow v. West Jersey & S. R. Co.* (Pa.), 211.

Plaintiff's use of ticket as affected by posters or advertisements issued by carrier, under Me. Rev. St. c. 53, § 3. *Crabtree v. Washington County Ry. Co.* (Me.), 472.

Rights and duties of passenger on car with wrong transfer negligently given him by conductor of other car. *Norton v. Consolidated Ry. Co.* (Conn.), 437.

Scalping tickets, application of Oregon Laws 1905, p. 422. *State v. Thompson* (Ore.), 150.

Scalping tickets, constitutionality of Oregon Laws 1905, p. 422. *State v. Thompson* (Ore.), 150.

TORTS.

See COMMON CARRIERS; LEASES AND RUNNING POWERS; NEGLIGENCE.

Assault by discharged stenographer upon railroad's clerk on depot platform, liability of company. *Alabama & V. Ry. Co. v. Harz* (Miss.), 479.

TRANSFERS.

See TICKETS AND FARES.

TRESPASSERS.**Damages.**

Punitive damages for ejection of trespasser from train by brakeman. *Hayes v. Southern Ry. Co.* (N. Car.), 547.

TRESPASSERS—Continued.**Ejection.**

Presentation of issues in action for ejection of trespasser from moving train. *Hayes v. Southern Ry. Co. (N. Car.)*, 547.

Proximate cause where trespasser, after his violent ejection from train, struck post and was thrown under car. *Hayes v. Southern Ry. Co. (N. Car.)*, 547.

Scope of brakeman's authority. *Hayes v. Southern Ry. Co. (N. Car.)*, 547.

Violent ejection from train may render railroad liable. *Hayes v. Southern Ry. Co. (N. Car.)*, 547.

TRIAL.

See EMINENT DOMAIN.

Mere fact that foreman of jury was in possession of "blue book" of free tickets for carriage on defendant's railroad was not necessarily fatal to verdict. *Shepard v. Lewiston, etc., St. Ry. (Me.)*, 792.

ULTRA VIRES.

See MONOPOLIES.

VARIANCE.

In action against carrier on bills of lading, for negligence as a carrier, no recovery could be had on evidence showing negligence as a warehouseman. *Warehouse Co. v. St. Louis, etc., R. Co. (Ill.)*, 300.

Where passenger traveling on freight train in charge of stock was injured by the carrier's negligence, and sued in tort, proof that the transportation was had under a written contract did not constitute fatal variance. *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 36.

VENUE.

Ky. Civ. Code Prac. § 73, does not include actions on contract to carry passengers. *Southern Ry. Co. v. Cassell (Ky.)*, 33.

WANTONNESS.

See NEGLIGENCE.

WAREHOUSEMEN.

Right of carrier to warehouse corn awaiting delivery in cars on side tracks. *Warehouse Co. v. St. Louis, etc., R. Co. (Ill.)*, 300.

Where question is whether goods were in defendant's possession as carrier or warehouseman, evidence that the failure of defendant's agent to deliver them on the morning of their arrival, to those plaintiff sent for them was wrongful was material. *Louisville & N. R. Co. v. Dunlap (Ala.)*, 453.

WHAT LAW GOVERNS.

See CARRIERS OF PASSENGERS.

WITNESSES.

See PERSONAL INJURIES.

Railroad's agents and employees in action against it for death of its engineer. *Atlantic Coast Line R. Co. v. Mallard (Fla.)*, 727.

1. The first part of the document is a list of names and addresses of the members of the committee.

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